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THE
NEW SYSTEM
OF
CRIMINAL
PROCEDURE, PLEADING AND EVIDENCE
IN INDICTABLE CASES,
AS FOUNDED ON
LORD CAMPBELL'S ACT, 14 & 15 VICT. c. 100,
AND OTHER RECENT STATUTES;
WITH
NEW FORMS OF INDICTMENTS
AND
EVIDENCE.

BY
JOHN FREDERICK ARCHBOLD, ESQ.
BARRISTER-AT-LAW.

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PREFACE.

TO Lord CAMPBELL the country are indebted for one of the greatest and best reforms in our Criminal Law, which has ever been made; and which is not only calculated to afford great and extraordinary facilities in the administration of criminal justice, but must, in its consequences, have a serious and most beneficial effect upon the state of crime in the country. Whoever is conversant with our old reports and our ancient text books on the Pleas of the Crown, must often have felt that both the Bench and the Bar were exercising all their ingenuity in devising little points and subtle distinctions, to enable the accused party to escape conviction. And it was so. But it was done from the purest, the most praiseworthy of motives:—by the Bar, from a sense of duty to their clients; by the Bench, from a feeling of humanity towards the accused. At a time when our criminal code was the most sanguinary of any in Europe, when every felony was punished with death, no wonder that the judges, *in favorem vitæ*, listened favourably to objections and nice distinctions, which, if now introduced for the first time, would not be entertained for a moment. And even

when our criminal code by degrees was ameliorated, softened down, the practice, fortified by the authority of former decisions, decisions often by the whole of the judges or a great majority of them, continued and even increased, until a mass of little points was accumulated, which operated as a great and serious obstruction to the course of justice. However pure and praiseworthy the motives from which this state of our criminal code originated, it was attended with most mischievous consequences. Juries looked astonished at finding a prisoner acquitted whom they considered to be clearly guilty, merely on account of some technical subtlety, which to their unlearned judgments must, no doubt, have appeared an absurdity. Prosecutors were discouraged from seeking to punish offenders, imagining that after expending their time and money in the endeavour, they would have the mortification of seeing the party acquitted from some cause entirely irrespective of the merits. And the offender himself, the hardened offender, acquitted on account of some "flaw in the indictment," as it was technically termed, exulted in his success, laughed at his judges, his jury, his prosecutor, and quitted the dock more determined than ever to continue his trade of crime; speculating on this state of the law for impunity, he grew more audacious in his exploits, until at last, after a course of crime for years, he was perhaps convicted, and punished.

This was not a healthy or sound state of our criminal law; and the only wonder is, that the state of crime in the country was not very much worse than it is. The judges of themselves could effect nothing to remedy the evil; they could not emancipate themselves from the authorities by which they were fettered, and which originated and perpetuated the mass of little subtleties by which the administration of the criminal law was impeded. Nothing but an Act of Parliament could effect it. And this Lord CAMPBELL framed, and introduced, and caused to be passed,—a task well worthy of the first Judge of the first Criminal Court in the country. By the statute 14 & 15 Vict. c. 100, the whole mass of little points and legal subtleties in indictable cases has been swept away, and hereafter criminal trials will be upon the merits, and the merits alone. Nor can or ought the accused to complain of this: if guilty, he has no right to be acquitted; if innocent, his best defence will be upon the merits. And in both cases, he will experience the same mild, patient, unimpassioned mode of trial, the same indulgence, the same facilities of bringing his case before the jury in the best, the most advantageous manner, that has hitherto prevailed. And if there be a fair and reasonable doubt upon the merits, he will still find the jury inclined, and directed by the judge, to give him the benefit of the doubt.

We are now, therefore, entering upon a new era in the administration of our Criminal Law; and Lord Campbell's Act, together with other statutes recently passed, create a new system of procedure, pleading, and, I may add, evidence, very different from that hitherto in practice. I have undertaken to develope this new system in the following work; and in doing so, I have encountered the usual difficulty, in engrafting the new matter on the old, so as to form of the whole one uniform, consistent system. Whether I have succeeded or not, it would not become me to assert; but I can with great sincerity say, that I have used every endeavour within my limited ability to do so. Nor is this so recent an undertaking as some persons may imagine. Lord Campbell first brought in his Bill in 1850; and I then, foreseeing the immense consequences of the measure, and the new system of administering our Criminal Law which it would introduce, determined on developing it, and reducing the whole to a practical form. I then arranged the plan of my intended work, collected and arranged my materials, and actually wrote a portion of it, when Lord Campbell's Bill, owing to his Lordship being on circuit at the time, was relinquished by Ministers in the Commons. In 1851, his Lordship again brought it forward; it passed the House of Lords, and by the aid of a good select committee, with the Right Honourable the President of the Poor Law Commission as Chairman,

it passed the House of Commons, and after some slight difficulty in the Lords relating to some amendments of the Commons, the Bill was passed. I then renewed my labours, the result of which I now offer to the Profession for their approval, trusting that it will be received with the same favour and indulgence which they have shown to my former works.

This work will be found to comprise the whole of the Criminal Law in indictable cases, from the apprehension of the offender, to his conviction and sentence. The apprehension of the prisoner, without warrant, is given from the common law authorities; his apprehension by warrant, the examination of the witnesses against him, and his commitment or bail, is given from the first of Jervis's Acts, stat. 11 & 12 Vict. c. 42. The indictment has assumed a new and more concise form: no addition is given to the defendant, because it is, and has long been useless, and the indictment is now good without it; time is stated, not that it is now required, but in order to conform to the prejudices of Grand Juries, who might possibly otherwise throw out the Bill; place or special venue in the body of the indictment is omitted, in all cases where it is not of the essence of the offence; and the statement of the offence, instead of being in that inverted style hitherto used, and seemingly borrowed from

literal translations of our old Latin Entries, is according to the usual and ordinary English collocation of the words,—which has often the effect of rendering averments unnecessary, which the inverted style required. Upon this new principle, I have given a whole body of forms, comprising indictments in nearly all the cases which occur in practice; and as the new system in many cases created an alteration in the evidence, I have thought it right and convenient, after each indictment, to state the evidence necessary to support it. I have little else to add, except that I have endeavoured to be correct; I have endeavoured to use language so plain and precise, that it cannot be misunderstood or misinterpreted; I have endeavoured to arrange the matter of the work in a manner to render it easily intelligible; and I have laboured to give an index, from which any matter contained in the work may be found with great facility. I do not say that I have succeeded in all this; but if I have, I trust the reader will agree with me in thinking that the work will be useful, which is the only commendation I expect or wish for it.

J. F. A.

9, *King's Bench Walk,*
Temple, 1852.

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112. *Line 14 from bottom, after "to wit," add "on —"*

148. *Line 20 from bottom, after the word "trial," add "In R. v. Scaife et al., 20 Law J., 229 m., the court of Queen's Bench held that where it is proved that a witness is kept out of the way by the prisoner, the deposition of the witness before the committing magistrate may be read in evidence against the prisoner at the trial ; but in that particular case, there were three defendants, and the witness was prevented from attending by one of them only ; under those circumstances, the court held that the deposition ought not to be read against the other two."*

170. *Line 6 from top, for "plaintiff," read "prosecutor."*

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THE NEW SYSTEM
OF
PROCEDURE AND PLEADING IN CRIMINAL CASES
FOR
INDICTABLE OFFENCES.

INDICTABLE offences comprise every species of treason, all felonies at common law or by statute, all misdemeanors of a public nature at common law, and all misdemeanors created by statute for which the remedy by indictment is appointed expressly or by necessary implication. If a statute prohibit a matter of public grievance to the liberties and security of the subject, or command a matter of public convenience, such as the repairing of the common streets of a town, or the like,—an offender against such a statute is punishable, not only by any party aggrieved, but by indictment for his contempt of the statute, unless that mode of proceeding appear manifestly to be excluded by the statute. 2 *Hawk. c. 25, s. 4.* But if a statute extend only to private persons,—or if it extend to all persons in general, but chiefly concern disputes of a private nature, such as distresses by lords on their tenants, or the like,—there an indictment will not lie. *Id.* If a statute enjoin an act to be done, without assigning any punishment for the not doing of it, there an indictment will lie for disobeying the injunctions of the statute; *R. v. Davis, Sayer, 133;* and this mode of proceeding by indictment will not be taken away by a subsequent statute, assigning a particular punishment for the disobedience, *Doug. 441, 446. R. v. Boyal, 2 Burr. 831. R. v. Balme, Cowp. 648,* unless by express negative words, or by necessary implication. So, if a statute forbid the doing of a thing, without assigning any punishment for it, the doing of it wilfully is an indictable offence, and punishable as a common law misdemeanor. *R. v. Sainsbury, 4 T. R. 451.* Even if a statute, creating a new offence, which was not prohibited by the common law, assign a particular punishment and mode of proceeding for it, but not in the same clause which created the offence, an indictment will lie, as

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for a common law misdemeanor ; *per Dennison, J.*, 1 *Burr.* 545 ; and *à fortiori* is it so, where the punishment is assigned or the mode of proceeding is directed by a subsequent statute. *Doug.* 441, 448. But if the mode of proceeding or punishment be directed by the same section or clause creating the offence, that punishment alone must be inflicted, or that mode of proceeding adopted, which the statute directs ; 2 *Hawk. c.* 25, *s.* 4 ; yet even in such a case, if the statute direct that the prosecutor shall proceed in a certain way “or otherwise,” an indictment will lie. *Id.* Or, if an offence at common law have a further or additional punishment assigned to it by statute, the prosecutor may still indict as for the common law offence ; and his concluding his indictment *contra formam statuti*, will not prevent him from maintaining it as an indictment at common law. *Id.* So, if the law cast a public duty upon a person, and he refuse or neglect to perform it,—as if a man be appointed to a public office, and he refuse to undertake or perform the duties of it, he may be indicted and punished as for a common law misdemeanor. See *R. v. George, Cowp.* 13. So, if he refuse to obey the order of a magistrate or court of quarter sessions, he may be indicted.

Having thus stated, shortly and generally, what offences are indictable, I shall now proceed to state the mode of proceeding against persons charged with or suspected of having committed them, as regulated by the recent statutes. And I propose to do so under the following heads :—

Part I. Proceedings for Indictable Offences.

II. Indictment and Evidence in particular Cases.

PART I.

Proceedings for Indictable Offences.

I propose to treat of this part of the work, under the following heads :—

Chapter 1. *Persons capable of committing Indictable Offences, and the Degree in which they may be Guilty.*

2. *Apprehension of the Offenders.*
3. *The Indictment and Pleadings.*
4. *Evidence.*
5. *The Trial, &c.*

CHAPTER I.

Persons capable of committing Indictable Offences, and the Degree in which they may be Guilty.

SECTION I.

What Persons are Punishable or Excusable for Crime.

Infants.] An infant, according to the legal acceptation of the term, is a person under twenty-one years of age. At and above the age of fourteen, an infant may be convicted of any offence, except those which consist of a non-feasance merely, such as the not apprehending persons committing felonies, or the like. 1 *Hale*, 21, 22, 25. 3 *Bac. Abr.* 581. 571. Under seven years of age, he cannot be convicted of felony; 1 *Hale*, 27, 28; and under fourteen he cannot be convicted of a rape, 1 *Hale*, 630, or of carnally knowing a girl under the age of ten, or between the age of ten and twelve, although he have arrived at the age of puberty, and be capable of committing the offence: *R. v. Jordan*, 9 *Car. & P.* 366; but he may be convicted as for an indecent assault. Between the ages of seven and fourteen, however, although presumed by law not to be *doli capax*, yet that presumption may be rebutted by evidence of circumstances, showing clearly that the infant was, at the time of committing the offence, capable of discerning between good and evil; and in such a case, he is as amenable for offences (excepting rape and offences of that description, and also offences of omission as above mentioned) as if he were of full age. Thus, a girl of thirteen was executed for killing her mistress. 1 *Hale*, 26. A boy of ten, and another of nine, who had killed their companion, have been sentenced to death, and he of ten years actually hanged; because upon their trials it appeared that the one hid himself, and the other hid the body he had killed, which hiding manifested a consciousness of guilt, and a discretion to discern between good and evil. 1 *Hale*, 26, 27. 4 *Bl. Com.* 23. And there was an instance in the seventeenth century, where a boy of eight years old was tried at Abingdon, for firing two barns; and it appearing that he had malice, revenge, and cunning, he was found guilty, and hanged. *Evelyn on* 1 *Hale*, 25. 4 *Bl. Com.* 24. And in 1748, a boy of ten years old, indicted for the murder of a girl of five, was found guilty and sentenced to be hanged: the girl was found buried in a dung heap, cut and mangled in a most barbarous and horrid manner; and as the boy and girl were companions and slept together, he was charged with the offence, but he denied it; afterwards,

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however, he confessed it, and, according to his confession, it appeared that he had carried the girl from the bed to the dung heap, and there killed her, cutting and mangling her in the manner above mentioned, then dug a pit for the body in the heap, and having placed the dung and straw which was bloody under the body, he covered it up with what was clean, and having done so, he got water and washed himself as clean as he could. As the judge who tried him did not wish to leave him actually for execution, before he had consulted the other judges on the subject, he reprieved him; and a report of the facts being afterwards laid before all the judges, they were unanimously of opinion that there were so many circumstances stated in the report, which were undoubted tokens of what Lord Hale (1 *Hale*, 630) called a "mischievous discretion," that the prisoner was certainly a proper object for capital punishment, and ought to suffer: "for it would be of very dangerous consequence to have it thought that children may commit such atrocious crimes with impunity; there are many crimes of the most heinous nature, such as the murder of young children, poisoning parents or masters, burning houses, or the like, which children are very capable of committing, and which they in some circumstances may be under strong temptations to commit; and therefore, although taking away the life of a boy of ten years old may savour of cruelty, yet, as the example of this boy's punishment may be a means of deterring other children from the like offences, and as the sparing this boy merely on account of his age will probably have a quite contrary tendency, in justice to the public the law ought to take its course." *York's case*, *Fost.* 70.

See as to the summary conviction of juvenile offenders, *post*, ch. 2, sec. 4.

Idiots and Lunatics.] Idiots are persons who have been permanently of nonsane memory from their birth; lunatics, persons who labour at times under temporary insanity, with lucid intervals; and there are others who, born sane, have become permanently insane from disease or other cause: and where in any of these cases, the degree of insanity is such, that the party knows not whether he is doing right or wrong, he is not punishable for any offence he may commit whilst in that state. *R. v. Higginson*, 1 *Car. & K.* 129. *M'Naughten's case*, where the opinions of the judges were taken in the House of Lords, 1 *Car. & K.* 130 n. *R. v. Arnold*, per *Tracy, J.*, 16 *How. St. Tr.* 764. *Lord Ferrer's case*, 19 *How. St. Tr.* 947, 948. *R. v. Offord*, 5 *Car. & P.* 168. *R. v. Oxford*, 9 *Car. & P.* 525. Even if a man of sound memory commit a capital offence, and before arraignment he becomes insane, he ought not to be arraigned for it, because he is not able to plead to it with that advice and caution that he ought; if after he is

tried and found guilty, he become insane before judgment, judgment shall not be pronounced; and if after judgment he become insane, judgment shall be stayed. 1 *Hale*, 34; 4 *Bl. Com.* 24.

By stat. 39 & 40 G. 3, c. 94, s. 1, where it shall be given in evidence, upon the trial of any person for treason, murder, or felony [or any misdemeanor, 3 & 4 *Vict. c.* 54, s. 3], that such person was insane at the time of the commission of such offence, and such person shall be acquitted, the jury shall be required to find specially whether such person was insane at the time of committing such offence, and to declare whether they acquitted him on account of such insanity; and if they do so find, the court shall order such person to be kept in strict custody, in such place and in such manner as to them shall seem fit, until His Majesty's pleasure shall be known. But the grand jury have no right to ignore a bill, because it is proved to them that the party was insane at the time he committed the offence; they must find the bill as if the offender had been sane, and leave the court and petty jurors to deal with the case, in the manner here provided. *R. v. Hodges*, 8 *Car. & P.* 195.

And by sect. 2, where a person indicted for any offence shall be insane, and upon indictment shall be found by a jury impanelled for that purpose to be insane, so that he cannot be tried,—or where upon the trial he shall be found to be insane,—the court may record such finding, and order the party to be kept in strict custody until His Majesty's pleasure shall be known. This section applies to all cases, as well misdemeanors as felonies. *R. v. Little*, *R. & Ry.* 430.

Also, if any person charged with any offence, shall be brought before any court to be discharged for want of prosecution, and such person shall appear to be insane, the court may order a jury to be impanelled to try the sanity of such person; and if the jury find him to be insane, the court may order him to be kept in strict custody, in such place and in such manner as to them shall seem fit, until His Majesty's pleasure shall be known. 39 & 40 G. 3. c. 94, s. 2.

Provision is made by stat. 3 & 4 *Vict. c.* 54, ss. 1, 2, for sending such lunatics to a lunatic asylum, and for their maintenance there, at the expense of the parish which is the last place of their legal settlement, if they have no property applicable to the purpose; or if they have no settlement, the expense of their maintenance shall be paid by the treasurer of the county, borough, &c., where they are imprisoned. See *Arch. Paup. Lun.* 94, &c.

It may be necessary to mention that drunkenness is no excuse for crime, but rather an aggravation of it, *Co. Lit.* 247, unless indeed it can be proved, to the satisfaction of the jury, that the defendant was at the time in such a state of mind, as

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not to be aware of the consequences of his actions. *R. v. Monkhouse*, 14 *Shaw's J. P.* 115.

Wife.] If the husband be present at the time his wife commits a felony (except murder and robbery), the law presumes that the wife acts under the coercion of her husband, excuses her, and punishes the husband only. 1 *Hawk.* c. 1, s. 2. But if she commit it in his absence, even although it be proved that he incited her to it, she is as amenable to punishment as if she were a feme sole. 1 *Hale*, 45. *Stamdf.* 26. So, if a wife commit treason, murder, or robbery, even in the company of her husband, the law, on account of the odiousness and dangerous consequences of these crimes, will not excuse her. 1 *Hawk.* c. 1, s. 9. 1 *Hale*, 47. So, if a wife commit an offence under felony, even in company with her husband, she is liable to punishment as if she were not married. 1 *Hawk.* c. 1, s. 13. *Dalt.* c. 139, p. 314; but see *R. v. Price*, 8 *Car. & P.* 19, *semb. cont.* Where the prisoners, husband and wife, were indicted, the wife with forging and uttering an order and certificate for prize money, and the husband as accessory before the fact, it was clear upon the evidence that the husband planned the matter, and urged and insisted on the wife presenting the forged order, &c., and applying for the prize money, but he was not present when she did so; and it was therefore objected that as it appeared plainly that the wife acted under the compulsion of her husband, she could not be found guilty; and if she as principal were acquitted, he as accessory must necessarily be acquitted also: both however being convicted, the judges held that with respect to the wife's guilt as principal, the presumption of coercion by the husband did not arise, as he was not present at the time, and they were therefore clearly of opinion that the wife was guilty of the uttering, and the husband guilty as accessory before the fact. *R. v. Sarah and John Morris*, *R. & Ry.* 270. Where husband and wife were indicted for receiving stolen goods, and both were convicted, the judges held that, as the charge against the husband and wife was joint, and it had not been left to the jury to say whether she had received the goods in the absence of her husband, the conviction of the wife could not be supported, even although it appeared that she had been more active in the matter than he. *R. v. Eliz. Archer et al.*, *Ry. & M.* 148. See *R. v. M'Clarens*, 13 *Shaw's J. P.* 343. *R. v. Matthews et al.*, 14 *Shaw's J. P.* 399. So, where a woman was indicted for the murder of her husband's apprentice, by not furnishing him with proper nourishment, Lawrence, J., held, that as the wife was in that respect the servant of her husband, and as it was not her duty to provide the boy with proper nourishment, she could not be guilty of any breach of duty in neglecting to do so; if indeed the husband had given her food for the boy,

and she had wilfully withheld it, it would be otherwise. *R. v. Squire and wife*, 1 *Russ.* 16. A woman, however, may be convicted of perjury, even although her husband were present at the time of her taking the oath, &c. *R. v. Dicks*, *MS. Bayley, J., cit.* 1 *Russ.* 16. So, she and her husband, or she alone, may be indicted for keeping a disorderly house, 1 *Hawk. c. 1, s. 12*, or gaming house, *R. v. Dixon and wife*, 10 *Mud.* 335, or for forcible entry, *Dalt.* 126, riot, conspiracy, &c. But a wife cannot be charged with having conspired with her husband alone; for conspiracy must be between two persons at the least, and husband and wife are but one person in law. 1 *Hawk. c. 72, s. 8*. Nor is she deemed accessory after the fact, in receiving her husband, although she may know at the time of his having committed a felony; for she is under his power, and is obliged to receive him. 1 *Hale*, 47, and see *R. v. Mary Good*, 1 *Car. & K.* 185. So, if the husband and wife jointly receive a third person, knowing him to be guilty of felony, the husband alone is guilty, the wife not; but if the wife alone receive him, in the absence of her husband, she may be convicted. 1 *Hale*, 621.

That a wife, who has committed a felony, has done so under the coercion of her husband, is however a presumption, which, like all other presumptions, may be rebutted by evidence to the contrary; and therefore if it appear clearly upon evidence, that the wife was not drawn into it by the husband, but that she was the principal actor in and inciter to it, she seems to be guilty as well as her husband. 1 *Hale*, 516. *R. v. Boober*, 14 *Shaw's J. P.* 355.

Also, a woman can never be said to be guilty of larceny of the goods of her husband, or of goods which are the property of her husband and others, unless she steal them from some third person, with intent to make such person chargeable for them; for as the husband and wife are one person in law, the wife's possession is deemed the possession of the husband. 1 *Hale*, 514. 1 *Hawk. c. 33, s. 19*. Where money, belonging to a friendly society, was deposited in a box, and placed in the custody of one of the members, and his wife broke open the box and stole the money, the judges held that an indictment against her as for larceny could not be sustained. *R. v. Willis, Ry. & M.* 375. If however, the box at the time were in the custody of any other person but the husband, she might be convicted, although the husband were a part owner of the money in it; because the taking would have the effect of charging the bailee. 1 *Hale*, 513, and see *R. v. Phæbe Bramley, R. & Ry.* 478. Where the wife of the prosecutor, and a man with whom she afterwards cohabited, jointly took money and goods belonging to the husband: the judges held that an indictment as for larceny would lie against the man, although not against the wife; and that notwithstanding the wife's consent,

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the property must be considered as having been taken *inuito domino*. *R. v. Tolfree, Ry. & M.* 243. *R. v. Thompson*, 14 *Shaw's J. P.* 309. *R. v. Tollett & Taylor, Car. & M.* 112. And where upon an indictment against a woman for setting fire to the house of her husband, it appeared that she had lived separate from him for two years, and had gone by her maiden name; and it also appeared clearly from the evidence, that she had set fire to the house out of malice to her husband, she having declared that she wished to burn him in the house: the judges held that she ought not to be convicted. *R. v. Eliza March, Ry. & M.* 182.

If the woman be indicted as a wife,—that being an admission upon record that she is so, will be sufficient. *R. v. Knight and wife*, 1 *Car. & P.* 116. Otherwise, if she set up her coverture as a defence, she must prove it. And proof merely of cohabitation with the man, and passing by his name, does not seem to be sufficient proof of this; *R. v. Hassal et al.*, 2 *Car. & P.* 434; although on the other hand, actual evidence of the marriage would not perhaps be required. See *R. v. Mary Good*, 1 *Car. & K.* 185.

Ambassadors and their servants.] For offences which are *mala prohibita* merely, and not *mala in se*, ambassadors and their suites are not punishable in this country. But for direct attempts against the life of the Queen, they are punishable; and if they are not punishable in the same manner for conspiracies against the Queen, this arises rather from political reasons, than from any rules of law. 1 *Hale*, 96—99; *Fost.* 187, 188. Also for murder, rape, or any other offence of great enormity against nature and the fundamental laws of society, they are punishable by the laws of this country as any other alien. *Id.* And Lord Hale cites, as an instance, the execution of Don Pantaleon Sa, the Portuguese ambassador's brother, and some of the ambassador's servants, for a murder committed by them in London. See however the case of *R. v. Guerchy*, (1 *W. Bl.* 545), where the attorney-general entered a *nolle prosequi* to an indictment found against the French ambassador, for hiring a person to assassinate the Chevalier D'Eon.

Aliens.] Aliens are punishable in this country, for offences committed here, in precisely the same way as natural born subjects; and if indicted, it is no excuse whatever that the act charged against them is no offence by the laws of their native country. *R. v. Esop*, 7 *Car. & P.* 456.

Corporations.] It was formerly imagined that an indictment would not lie against a corporation aggregate; and it was then the custom to join in the indictment with the corpo-

ration, or indict alone, such of the leading members of the body as principally caused the act or omission complained of. It was afterwards holden that an indictment would lie against them by their corporate name for a breach of duty. *R. v. The Birmingham and Gloucester Railway Co.* 3 Q. B. 223. And it is now fully settled that an indictment will lie against a corporation aggregate, as well for a misfeasance as a non-feasance—for a wrongful act as well as for a wrongful omission. *R. v. The Great North of England Railway Co.*, 11 Shaw's J. P. 21.

Persons offending from chance, mistake, &c.] Where a man, in the execution of one act, by misfortune or chance, and not designedly, does another act, for which, if he had wilfully committed it, he would be liable to be punished:—in that case, if the act he was doing were lawful, or merely *malum prohibitum*, he shall not be punishable for the act arising from misfortune or chance; but if *malum in se*, it is otherwise. 1 Hale, 39; Fort. 259. Even the killing of another by misfortune, or in any other way not felonious, is not now punishable, nor is any forfeiture incurred. But this exemption from punishment must be understood of cases where the innocent act is done with reasonable skill and care: if the unintended offence arise from ignorance, where skill was required, or from negligence, where care and caution were required, the party will in most cases be liable to punishment for the act done, which was not intended. If a man take upon himself an office or duty, requiring skill or care,—if by his ignorance, carelessness, or negligence he cause the death of another, he will be guilty of manslaughter: as if a person, by careless or furious driving, unintentionally run over another and kill him, it will be manslaughter; *R. v. Walker*, 1 Car. & P. 320. *R. v. Mastin*, 6 Car. & P. 396. *R. v. Grout*, *Id.* 629. *R. v. Timmins*, 7 *Id.* 499. *R. v. Swindall et al.*, 2 Car. & K. 230; or if a person in command of a steam-boat, by negligence or carelessness, unintentially run down a boat, &c., and the person in it is thereby drowned, he is guilty of manslaughter. *R. v. Green*, 7 Car. & P. 156; and see *R. v. Allen*, *Id.* 153. In like manner, if a person, whether a medical man or not, profess to deal with the life or health of another, he is bound to use competent skill and sufficient attention; and if he cause the death of the other through a gross want of either, he will be guilty of manslaughter. *R. v. Spiller*, 5 Car. & P. 333. *R. v. Van Butchell*, 3 *Id.* 629. *R. v. Williamson*, *Id.* 635. *R. v. St. John Long*, 4 *Id.* 398, 423. *R. v. Webb*, 1 Moody & R. 405. Or, if a man, without malice to any individual, wilfully do an act, which he knows must or will probably cause the death of some person whom he knows not, and a man be thereby killed, he will be guilty of murder. If a

10 *Persons punishable or excusable for Crime.*

man, in building or repairing a house, throw a stone from it into the street or way, and it hit a person passing, and kill him, —if he did this in a street where many persons were passing, and without properly warning the persons below, he is guilty of murder; if in a retired place where no persons were likely to pass, he would not be liable to punishment. 3 *Inst.* 70. *Fost.* 263. If a man, being on a horse which he knows to be used to kick, wilfully ride him amongst a crowd of persons, and the horse kick a man and kill him, the rider is guilty of murder, although he had no malice against any particular person, nor any other intention than that of diverting himself by frightening the persons around him. 1 *Hawk. c.* 31, *s.* 68. But if a horse run away with his rider, so that he has no control over him, and the horse kill or injure a man, the rider is dispunishable. See *Gibbon v. Pepper*, 2 *Salk.* 638, 1 *Ld. Raym.* 38.

A person, from ignorance or mistake, not of law but of fact, may commit an offence, and still be dispunishable for it: as if a man, thinking to kill a housebreaker in his house, kill one of his own family, he is not punishable for it. *Cro. Car.* 538. 4 *Bl. Com.* 27. But if the act he intended doing were unlawful, he may in general be punishable for the act he committed through ignorance or mistake, in the same way as if he wilfully did it: as, for instance, if a man intending to kill A. kill B., he will be equally guilty as if he had killed A.

Persons offending through compulsion.] If a man be forced to commit an offence, by such threats or menaces of personal violence by others, as induces a well-grounded apprehension of death or other bodily harm in case he should refuse to do it, this will in general excuse him. See 3 *Inst.* 10. 1 *Hale*, 56. *Fost.* 217. Even if a man be thus compelled to join rebels or foreign enemies, in a time of rebellion or war, he will be excused for remaining with them so long as the compulsion lasted. *Fost.* 216, 217. But no threat to burn his house or destroy his property, or the like, will be sufficient for this purpose. *McGrowther's case*, *Fost.* 13. 9 *St. Trial.* 566.

Persons who are the innocent agents of others.] If a man procure an offence to be committed by an innocent agent, the man alone is guilty, the agent not. If an idiot or madman be incited to commit murder, and he do it, the inciter is guilty of the murder, the idiot or madman not. And the inciter in such a case is deemed principal in the first degree, though not present when the offence was committed: he cannot be deemed accessory, for that necessarily presupposes a principal, and the idiot or madman, so far from being principal, is merely the instrument of death in the hands of the inciter; he must therefore be principal, and in the first degree,

for there is no other person whom he can aid or abet. 1 *Hale*, 617. 2 *Hawk. c.* 29, s. 11. Where a man was indicted as principal in stealing coal from a mine, and it appeared that he was lessee of one mine, and from thence caused his workmen to take the coal of other persons under the adjoining land,—he was convicted, the judge, (Erle, J.) saying that although the prisoner did not, by his own hand, pick or remove the coal, yet if a man do, by means of an innocent agent, an act which amounts to a felony, the employer, and not the agent, is the person accountable for the act. *R. v. Bleasdale*, 2 *Car. & K.* 765. So where a post-office order was payable to Wm. Smart, and the prisoner, knowing the fact, forged Smart's name to a letter authorizing one Bartlett to sign Smart's name to the usual receipt on the money order, which Bartlett (not knowing the fraud) accordingly did, and received the amount of the post-office order, and gave it to the prisoner for Smart: the prisoner being indicted for forgery of the receipt, Platt, B., after conferring with the Lord Chief Baron, held that Bartlett must be deemed an innocent agent, and the case must therefore be considered the same as if the prisoner himself signed the receipt. *R. v. Clifford*, 2 *Car. & K.* 202. So, where A. employed B., a die-sinker, to make dies which would impress the resemblance of the two sides of a shilling, and B. immediately communicated the matter to the officers of the Mint, who directed him to execute A.'s order, and he did so: A. being indicted for the offence as principal and convicted, the judges held that he was rightly convicted. *R. v. Barman*, 1 *Car. & K.* 295.

SECTION II.

Degrees of Guilt.

A party is guilty either as a principal or accessory: as principal, he is either principal in the first degree or in the second; as accessory, he is either accessory before the fact, or accessory after it.

1. *Principals.*

The distinction between principals and accessories, only obtains in felonies; in treason and misdemeanors all are principals.

Principals are either in the first degree or in the second. He who actually commits the offence, is said to be principal in the first degree; he who is present, aiding and abetting him in doing it, is said to be principal in the second degree. See *R. v. Boyce*, 4 *Burr.* 2073. Persons who are present at the commission of an offence, are said to be aiding and abetting the party actually committing it, if they be confederated or

engaged with him in a common design, of which the offence is part, *R. v. Tattersall*, 1 *Russ.* 22. *R. v. Standley*, *R. & Ry.* 305. *R. v. Bowen*, *Car. & M.* 149, and see *R. v. Hornby et al.*, 1 *Car. & K.* 305, or if by their presence they encourage him in the commission of it. *R. v. Murphy*, 6 *Car. & P.* 103. And persons are said to be so present, who, being engaged in the same design with the person who actually commits the offence, although not actually present at the commission of it, are yet at such a convenient distance as to be able to come to the immediate assistance of their associate, if required, or to watch to prevent surprise, or the like. See *Fost.* 350-355. *R. v. Goggerly & Whitford*, *R. & Ry.* 343. And where a person was waiting outside of a house, to receive goods which his confederate was stealing within, he was holden to be a principal in the theft. *R. v. Owen*, *Ry. & M.* 96. So, persons present, aiding and abetting in part of the offence, may, if the offence be completed by their confederate, be indicted as principals: and therefore where two persons, with their umbrella, screened a third whilst he was breaking into a dwelling house in the day time, and then went away, and were not seen near the place whilst the third party was committing a larceny within the house, Galelee, J., and Gurney, B., held that they were principals as to the whole offence, namely, the breaking and entering the dwelling house, and stealing therein. *R. v. Jordan et al.*, 7 *Car. & P.* 432.

But if a man be at such a distance from the place where the offence is committed, that he could not assist in it if required, he cannot be deemed a principal: and therefore it was holden, that going towards the place where a larceny was to be committed, for the purpose of assisting in carrying off the property, and assisting accordingly, did not make the party a principal in the larceny, where it appeared that he was at such a distance at the time of the felonious taking, that he could not have assisted in it. *R. v. Kelly*, *R. & Ry.* 421. So, where persons, having stolen goods from a warehouse, carried them along the street for about thirty yards, and then fetched the prisoner, who was apprised of the robbery, but not at all acting in it, and he assisted in carrying away the property: it was holden that he was not a principal, but an accessory merely. *R. v. King*, *R. & Ry.* 332. So, where a servant let another into his master's house, for the purpose of stealing in it, and where he remained all night; the servant left the house the next morning and did not return until the evening, and during his absence the other committed a larceny in the house: the servant being indicted as accessory before the fact, it was contended by his counsel that he should have been indicted as principal; but Coleridge, J., held that there was no ground for the objection, as no part of the larceny was committed whilst the servant was in the house or could be aiding in it. *R. v. Tuckwell & Perkins*, *Car. & M.* 215. So,

where several persons were out for the purpose of committing a felony, but, upon an alarm, ran different ways, and one of them, to avoid being taken, wounded a man who was pursuing him : it was holden that the others could not be deemed principals in this offence. *R. v. White, R. & Ry.* 99. So, where two persons were riding their horses violently along the road, seemingly racing, and the first of them passed a man on horseback without injuring him, but the last rode against him, threw him, and he was killed : Patteson, J. held that the first of the two could not be deemed a principal in the homicide. *R. v. Martin et al., 6 Car. & P.* 396.

The law, however, recognizes no difference between the offence of the principal in the first degree, and of the principal in the second ; both are equally guilty. And so immaterial is the distinction considered in practice, that if a man be indicted as principal in the first degree, proof that he was present aiding and abetting another in committing the offence, although his was not the hand which actually did it, will support the indictment ; 2 *Hawk. c.* 34, *s.* 64 ; and on the other hand, if he be indicted as principal in the second degree, proof that he was not only present, but committed the offence with his own hand, will support the indictment. Therefore if A. be indicted for being present aiding and abetting B. in committing a felony, A. may be convicted, although B. is acquitted. See *R. v. Phelps et al., Car. & M.* 180. So when an offence is punishable by a statute which makes no mention of principals in the second degree, such principals are within the meaning of the statute as much as the parties who actually commit the offence ; and therefore in the case of rape, a person may be convicted on an indictment charging him with being present aiding and abetting another who actually committed it. *R. v. Crisham, Car. & M.* 187. So, for the same reason, principals in the second degree are always punishable in the same manner as principals in the first degree : this is sometimes expressly mentioned in the statutes relating to the offences, as in Peel's Acts for Larceny, &c., 7 & 8 G. 4, *c.* 29, *s.* 61, and for malicious injuries, 7 & 8 G. 4, *c.* 30, *s.* 26, in the statute relating to forgery, 1 W. 4, *c.* 66, *s.* 25, and in the statute relating to counterfeiting the coin, 2 W. 4, *c.* 34, *s.* 18, and others ; but such express enactment appears to have been unnecessary from what has been above observed as to the identity of the offence of the principal in the second degree with that of principal in the first degree.

But although a principal in the second degree may be convicted and punished upon an indictment charging him as having committed the offence, yet, as a grand jury, ignorant of this rule of law, may by mistake imagine in such a case that the evidence does not support the indictment, and ignore the bill, it may be thought convenient in some cases to indict the aider and abettor in felony, as such.

The following may be the form of an

Indictment against a Principal in the second Degree.

*Berks, } The jurors for our lady the Queen upon their
to wit : } oath present, that A. B., on the — day of —,
in the year of our Lord, 1851, [&c., stating the offence of the
principal in the first degree; and then, before the conclusion add-
ing]: And the jurors aforesaid on their oath aforesaid do fur-
ther present, that C. D., on the day and year aforesaid, felo-
niously was present, aiding, abetting, and assisting the said
A. B., the felony aforesaid to do and commit. Against [the
form of the statute in such case made and provided,] and
against the peace of our lady the Queen, her crown and
dignity.*

Where a man was indicted for murder, the indictment stating the wound to have been given on the 27th May, and the death to have been on the 29th, and two others were indicted as principals in the second degree, the indictment stating that they on the day and year first aforesaid were present aiding, &c. : it was objected that this was repugnant and bad, as the offence was not completed until the death, on the 29th ; but the judges held it to be correct. *R. v. O'Brian et al.*, 2 Car. & K. 115.

2. Accessories before the Fact.

Who, and in what cases.] An accessory before the fact to a felony, is one who counsels, incites, moves, procures, hires or commands another to commit it, but is not himself present aiding or abetting in the commission of it. 2 Hawk. c. 29, s. 16. *R. v. Gordon*, 1 Leach, 515. 1 East, P. C. 352. And see *R. v. Tuckwell et al.*, Car. & M. 215. And if the felony afterwards committed, be the same in substance with that counselled or commanded, the party who counselled or commanded it will be deemed an accessory to it, although there be some variance in time, place, manner, or other circumstance between the advice or command and the execution of it: as where a person advises a man to kill another in the day, and he kills him in the night,—or to kill him in the fields, and he kills him in the town,—or to poison him, and he stabs or shoots him,—in these cases he is as much an accessory, as if his advice or command had been strictly pursued. 2 Hawk. c. 29, s. 20. But if the execution vary in substance from the advice or command,—as if a man advise another to kill A., and he kills B.,—or to burn the house of A., and he burns the house of B.,—or to steal an ox, and he steals a horse,—or to steal a particular horse, and he steals another,—or to commit a felony of one kind, and he commits another of quite a different nature,—in these and the like cases, the party who advised or

commanded, &c., cannot be deemed an accessory before the fact to the felony actually committed. 2 *Hawk. c. 29, s. 21*. There cannot however be an accessory before the fact to manslaughter; for that offence, in its nature, cannot be premeditated. 1 *Hale, 618*. The doctrine as to accessories, also, is confined entirely to felonies; for in treason and misdemeanors, those who, by counsel or incitement, &c., would be accessories before the fact in felony, are deemed principals, and prosecuted and punished accordingly. Thus, where a woman advised and encouraged a man to set fire to a malt-house, and he attempted to do so, but she was not present at the time, it was holden that both of them might be jointly indicted as principals for the attempt. *R. v. Clayton et al., 1 Car. & K. 128*. It is not necessary, in order to constitute the offence of accessory, that there should be any direct communication between him and the principal; the procurement may be through the intervention of an agent. *R. v. Cooper, 5 Car. & P. 534*. And if managed through an agent, it is not necessary that the principal should be named by the accessory; if the latter desire the agent to procure some person to commit the offence, without naming him, and the agent accordingly procure a person, wholly unknown to the accessory, to commit it, it will be sufficient to constitute the offence of accessory before the fact. *Id.* If the principal felon be unknown, the indictment of the accessory may state it accordingly; and if it afterwards turn out that he is known, although this formerly would be a fatal variance, *R. v. Walker, 3 Camp. 264*, yet now it seems the court may order the indictment to be amended, according to the fact. See 14 & 15 *Vict. c. 100, s. 1*.

When, and how tried and punished.] Formerly accessories before the fact could only be tried with the principal or after the principal was convicted; and they were punishable in various ways by several statutes. See 2 *Hawk. c. 29*. But now, by stat. 7 G. 4, c. 64, s. 9, if any person shall counsel, procure, or command any other person to commit any felony, whether the same be a felony at common law or by statute, the person so counselling, procuring, or commanding shall be deemed guilty of felony, and may be indicted and convicted, either as an accessory before the fact to the principal felony, together with the principal felon or after his conviction, or may be indicted and convicted of a substantive felony, whether the principal felon shall or shall not have been previously convicted, or shall or shall not be amenable to justice, and may be punished in the same manner as any accessory before the fact to the same felony, if convicted as an accessory, may be punished; and the offence of the person so counselling, procuring, or commanding, howsoever indicted, may be inquired of, tried, determined, and punished, by any

court which shall have jurisdiction to try the principal felon, in the same manner as if such offence had been committed at the same place as the principal felony, although such offence may have been committed on the high seas or at any place on land, whether within His Majesty's dominions or without; and that in case the principal felony shall have been committed within the body of any county, and the offence of counselling, procuring, or commanding shall have been committed within the body of any other county, the last-mentioned offence may be inquired of, tried, determined, and punished in either of such counties.

In order to amend the law still further, by stat. 11 & 12 Vict. c. 46, s. 1, after reciting that it was expedient that an accessory before the fact to felony should be liable to be indicted, tried, convicted, and punished, in all respects like the principal, as was then the case in treason and in all misdemeanors,—it was enacted, that “if any person shall become an accessory before the fact to any felony, whether the same be a felony at common law or by virtue of any statute or statutes made or to be made, such person may be indicted, tried, convicted, and punished in all respects as if he were a principal felon.”

In all cases of felony, therefore, the accessory is punishable in the same manner precisely as the principal felon; and he may now be indicted either as a principal, that is, he may be charged in the indictment with having actually committed the offence as principal in the first degree, or he may be indicted as accessory as for a substantive felony, or he may be indicted as accessory with the principal, at the option of the prosecutor. The following may be a form of an

Indictment of an Accessory before the Fact, with the Principal.

*Yorkshire,) The jurors for our lady the Queen upon
to wit:) their oath present, that A. B., on the — day
of —, in the year of our Lord —, [&c., stating the offence against the principal; and then, before the conclusion, stating the offence of the accessory thus:] And the jurors aforesaid upon their oath aforesaid do further present that C. D., before the committing of the said felony by the said A. B. as aforesaid, to wit, on the day and year aforesaid, feloniously did counsel, procure, and command the said A. B. the said felony in manner and form aforesaid to commit: [against the form of the statute in such case made and provided,] and against the peace of our lady the Queen, her crown and dignity.*

It is not necessary in this indictment to conclude “*against the form of the statute,*” unless the offence of the principal

require it. But in an indictment against an accessory alone, as for a substantive felony, the conclusion ought to be so. In other respects the indictment against the accessory as for a substantive felony, is the same in form as the above. The indictment against the accessory as a principal, is of course in the same form as an ordinary indictment against the person who actually committed the principal felony. There is an inconvenience, however, in indicting in the latter form alone, as the grand jury, perhaps, not knowing the law upon the subject, may ignore the bill. In order to avoid this, it may be advisable to add a count as accessory, in the above form.

And lastly, by stat. 14 & 15 Vict. c. 100, s. 15, reciting that it often happens that the principal in a felony is not in custody or amenable to justice, although several accessories to such felony, or receivers at different times of stolen property the subject of such felony, may be in custody and amenable to justice :—for the prevention of several trials, it is enacted that any number of such accessories or receivers may be charged with substantive felonies in the same indictment, notwithstanding the principal felon shall not be included in the same indictment, or shall not be in custody or amenable to justice. It is not stated whether by the word accessories here is meant accessories before the fact, or after the fact, or both ; probably as the word is coupled with “ receivers,” it will be understood to mean accessories after the fact. It does not appear also whether it was intended that the section should extend to accessories in all felonies, or in larceny only ; probably the latter. It is also not stated whether there may be several counts against each accessory or receiver ; probably it will be holden that there may.

3. *Accessories after the Fact.*

Who, and in what cases.] After a felony has been committed, if any person receive, harbour, or assist the principal felon, knowing him to have committed the felony, he is deemed an accessory after the fact ; in law, any assistance whatever given to him, in order to hinder his being apprehended or tried, or to prevent his suffering the punishment to which he is liable,—rescuing him, allowing him to escape, opposing his apprehension, or the like,—the party knowing at the time that he had committed a felony, makes such party guilty as accessory after the fact to the felony. 2 *Hawk. c. 29, ss. 26, 27.* Upon the trial of a man as principal in the second degree to a larceny, it appeared that a person, having stolen goods from a warehouse, carried them along the street for about thirty yards, and then fetched the prisoner, who was apprised of the robbery, but not at all acting in it, and he assisted in carrying away the property : it was holden that he was not a principal, but an accessory

after the fact. *R. v. King, R. & Ry.* 332. But receiving stolen goods, knowing them to have been stolen, did not amount to the offence of accessory after the fact to the principal felon, until made so by stat. 3 & 4 W. & M. c. 9, and 5 Anne, c. 31, s. 5. 2 *Hauck. c.* 29, s. 9. And a wife cannot be convicted as accessory after the fact, for any receipt of or assistance to her husband. *Id. s.* 34. See *R. v. Mary Good*, 1 *Car. & K.* 185. But the exemption does not extend further: a husband may be indicted as accessory after the fact to his wife, a brother to a brother, a master to a servant, a servant to a master. 2 *Hauck. c.* 29, s. 34. And the doctrine extends to every felony, and to manslaughter as well as to others. *R. v. Greenacre*, 8 *Car. & P.* 35. But it must be considered as having reference to felony only; the same receipt which in felony will make a man accessory after the fact, will in treason make the party a principal traitor, 1 *Hale*, 238, but in misdemeanors is not punishable. 1 *Hale*, 613.

When, and how tried.] Formerly an accessory after the fact could only be tried with the principal, or after the principal was convicted; and if tried after the conviction of the principal, he could only be tried in the county where the offence of accessory was committed. But by stat. 11 & 12 Vict. c. 46, s. 2, reciting this, and that it was sometimes productive of a failure of justice, it is enacted that if any person shall become an accessory after the fact to any felony, whether the same be a felony at common law or by statute, he may be indicted and convicted either as an accessory after the fact to the principal felony together with the principal felon, or after the conviction of the principal felon,—or may be indicted and convicted of a substantive felony, whether the principal felon shall or shall not have been previously convicted, or shall or shall not be amenable to justice, and may thereupon be punished in like manner as any accessory after the fact to the same felony, if convicted as an accessory, may be punished; and the offence of such person, howsoever indicted, may be inquired of, tried, determined, and punished, by any court which shall have jurisdiction to try the principal felon, in the same manner as if the act by reason of which such person shall have become an accessory had been committed at the same place as the principal felony.

The following may be the form of an

Indictment against an Accessory after the Fact, with the Principal, or for a substantive Felony.

Hants, } *The jurors for our lady the Queen upon their*
to wit: } *oath present, that A. B., on the — day of —,*
in the year of our Lord —, [&c., stating the offence
against the principal; and immediately before the conclusion

add:] *And the jurors aforesaid upon their oath aforesaid do further present, that C. D., after the said A. B. had done and committed the said felony, to wit, on the day and year aforesaid, well knowing that the said A. B. had done and committed the same, him the said A. B. did feloniously receive, harbour, and maintain: against the form of the statute in such case made and provided, and against the peace of our lady the Queen, her crown and dignity.*

This form answers, as well where the accessory is tried alone for a substantive felony, according to stat. 11 & 12 Vict. c. 46, s. 2, above-mentioned, as where he is tried with the principal. *R. v. Hansill*, 13 *Shaw's J. P.* 556. In either case, the prosecutor must first prove the offence of the principal, as if he alone were on his trial; and then he must prove the receipt or assistance of the accessory, and that he knew at the time that the principal had committed the felony. On the other hand, the accessory may not only controvert his own guilt, but that of his principal also; and if he succeed in either, he must be acquitted.

As to the joinder of several accessories, see stat. 14 & 15 Vict. c. 100, s. 15, *ante*, p. 17.

Punishment.] There is no uniform punishment for the offence of accessory after the fact. The offence in all cases is felony; but it is punishable in various ways, by the several statutes which assign the punishment to the principal felony. In felonies within stat. 7 & 8 G. 4, c. 29 (the Larceny Act), accessories after the fact are punishable with imprisonment with or without hard labour, for any term not exceeding two years, by sect. 61; and the same, in felonies within stat. 7 & 8 G. 4, c. 30 (Malicious Injuries), by sect. 26; in felonies within stat. 9 G. 4, c. 21 (Offences against the Person), by sect. 31; in felonies within stat. 1 W. 4, c. 66 (Forgery), by sect. 25; in felonies within stat. 2 W. 4, c. 32 (Coin), by sect. 18; and in felonies within stat. 1 Vict. c. 36 (Post Office), by sect. 35.

4. Persons who solicit and incite others to commit Offences, which are not afterwards committed.

We have seen that the offence of accessory before the fact is, where a person incites another to commit a felony, which the other afterwards commits. The offence of the accessory, in this case is a felony. But if the party thus incited do not afterwards commit felony, or if a man solicit or incite another to commit an indictable misdemeanor which the other does not afterwards commit, the offence of the inciter is but a common law misdemeanor, punishable as such with imprisonment or fine, or both. *R. v. Higgins*, 2 *East*, 5.

The following may be the form of an

Indictment for soliciting a Person to commit an indictable Offence.

*Bedfordshire, } The jurors for our lady the Queen upon their
to wit : { oath present, that A. B., on the — day of
—, in the year of our Lord —, unlawfully did solicit and
incite one C. D. to [here state the offence] : against the peace
of our lady the Queen, her crown and dignity.*

Also, by stat. 1 Vict. c. 36, which defines and punishes several felonies and misdemeanors in respect of the post-office, such as stealing or embezzling letters, stealing from letters, opening or delaying letters, &c., it is enacted by sect. 36, that every person who shall solicit or endeavour to procure any other person to commit a felony or misdemeanor punishable by the Post-office Act, shall be deemed guilty of a misdemeanor, and be adjudged to be imprisoned for a term not exceeding two years.

5. Persons who attempt to commit Crimes, but do not complete them.

All attempts to commit a felony, not specially provided for and made punishable by some particular statute, are punishable as misdemeanors at common law, whether committed with force or otherwise. See *R. v. Higgins*, 2 East, 5. And in like manner, every attempt to commit a misdemeanor, either at common law, or created by statute, is itself a misdemeanor at common law. *R. v. —*, *R. & Ry.* 107, per *Le Blanc*, J. *R. v. Butler*, 6 Car. & P. 368, per *Patteson*, J. *R. v. Roderick*, 7 Car. & P. 795. *R. v. Ball*, Car. & M. 249. The punishment at common law, is by fine or imprisonment, or both. But the punishment by statute, for some cases of this description, is more severe: an assault with intent to commit a felony, generally, is punishable with imprisonment, with or without hard labour, for not more than two years; 9 G. 4, c. 31, s. 25; an assault with intent to rob, is made a felony, and punishable with imprisonment with or without hard labour, for not more than three years; 1 Vict. c. 87, s. 6; attempts to murder, by poison, by stabbing, cutting or wounding, by shooting or attempting to shoot, or by attempts to drown, suffocate, or strangle,—are all made felonies, and punishable with great severity. 1 Vict. c. 85. These several offences we shall notice fully in a subsequent part of the work, when we come to give the forms of indictments, and the evidence necessary to support them.

CHAPTER II.

Apprehension of the Offender.

I propose to arrange the matter of this chapter, under the following heads:—

Section 1. *Arrest without Warrant.*

2. *Arrest with Warrant.*

3. *The Examination and Commitment or Bail.*

4. *Conviction of Juvenile Offenders for Larceny.*

SECTION I.

Arrest of Offender without Warrant.

In the act of committing the offence.] Every person,—private individuals as well as constables,—present when a felony is committed or a dangerous wound given, not only may apprehend the offender, but they are bound to do so. 2 *Hawk. c. 12, s. 1.* 1 *East, P. C. 377, s. 1.* If a private person be present at an affray, he may stay the affrayers until the heat is over, and then deliver them over to the constable, and he may stop others coming to join either party; 2 *Hawk. c. 13, s. 8*; and a constable of course may act in like manner, and may keep any of the affrayers in safe custody until he can bring them before a justice of the peace. So, it has been holden that any person may arrest another, whom he sees cheating with false dice. 2 *Hawk. c. 12, s. 20.* But after the affray is ended, the parties cannot be arrested without warrant. 2 *Hawk. c. 13, s. 8.* *Id. c. 12, s. 20.* 2 *Inst. 52.*

In all cases of offences against stat. 7 & 8 G. 4, c. 29 (Peel's Act, Larceny, &c.), it is enacted, that any person found committing any offence punishable, either upon indictment or upon summary conviction, by virtue of that Act, (except only the offence of angling in the day time,) may be immediately apprehended without a warrant, by any peace officer,—or by any owner of the property on or with respect to which the offence shall be committed,—or by his servant,—or by any person authorized by him,—and forthwith taken before some neighbouring justice of the peace, to be dealt with according to law. 7 & 8 G. 4, c. 29, s. 63.

So, in all offences against stat. 7 & 8 G. 4, c. 30 (Peel's Act, Malicious Injuries), persons found offending may be apprehended in like manner. *Id. s. 28.* In these cases, and in cases within ch. 29 above mentioned, the offender must be taken, either in the act of committing the offence, or on fresh

pursuit; *Hanway v. Boulton*, 1 *Moody & R.* 15. *R. v. Curran*, 3 *Car. & P.* 397; but not on his return after committing the offence. *R. v. Phelps et al.*, *Car. & M.* 180.

So, by the statute against night poachers, 9 G. 4, c. 69, s. 2, it is enacted, that if any person shall be found on any land, committing any such offence as hereinbefore mentioned, it shall be lawful for the owner or occupier of such land,—or for any person having a right or reputed right of free-warren or free-chase thereon,—or for the lord of the manor or reputed manor wherein such land may be situate,—and also for any gamekeeper or servant of any of the persons herein mentioned, or any persons assisting such gamekeeper or servant,—to seize and apprehend such offender upon such land, or, in case of pursuit being made, in any other place to which he may have escaped therefrom, and to deliver him as soon as may be into the custody of a peace officer, in order to his being conveyed before two justices of the peace. See *R. v. Ball*, *Ry. & M.* 330. The offender, however, to come within this clause of the Act, must have by night (that is, from the expiration of the first hour after sunset, until the beginning of the last hour before sunrise) unlawfully taken or destroyed game or rabbits, in any land, whether open or inclosed, or have by night unlawfully entered into or been in any land, whether open or inclosed, with any gun, net, engine, or other instrument, for the purpose of destroying game. See 9 G. 4, c. 69, s. 1. *R. v. Tomlinson*, 7 *Car. & P.* 183. So, if any person by night shall take or destroy game or rabbits on a public road or foot path, or the sides thereof, or at the openings, outlets, or gates from land into such road or path, the owner or occupier of any land adjoining either side of that part of such road or path where the offender shall be, and the gamekeeper or servant of such owner or occupier, and any person assisting such gamekeeper or servant, and for all the persons authorized by stat. 9 G. 4, c. 69, s. 2, to apprehend any person offending against the provisions of that Act, may seize and apprehend any offender against the provisions of this Act. 7 & 8 Vict. c. 29, s. 2. But if the poachers are not found upon the land or road committing the offence, but are met by the gamekeeper on the road, on their return after committing it, he has no right to apprehend them under these statutes. *R. v. Meadham*, 2 *Car. & K.* 633. It may be necessary to mention, that a person appointed as a watcher, is within the meaning of these clauses. *R. v. Price*, 7 *Car. & P.* 178. *R. v. Fielding*, 2 *Car. & K.* 621. But the gamekeeper of a person who is not himself the owner or occupier of the land, but has merely the permission of the owner to shoot over it and to preserve the game there, cannot apprehend poachers under the above statutes. *R. v. Addis*, 6 *Car. & P.* 388.

So, by the statute for the protection of works of art, and scientific and literary collections, (8 & 9 Vict. c. 44), sect. 3,

it is enacted, that any person found committing any offence against that Act, may be immediately apprehended, without a warrant, by any other person, and forthwith taken before some neighbouring justice of the peace, to be dealt with according to law.

Also, by the recent statute for the prevention of offences, 14 & 15 Vict. c. 19, it is enacted by sect. 10, that it shall be lawful for any person whatsoever to apprehend any person who shall be found committing any offence against the provisions of that Act, and to convey him or deliver him to some constable or other peace officer, in order to his being conveyed as soon as conveniently may be before a justice of the peace, to be dealt with according to law. And the offences within the Act are—being found at night armed with any dangerous weapon or instrument, with intent to break and enter a dwelling house or building, to commit a felony therein,—or being found by night, having in his possession any picklock key, crow, jack, bit, or other implement of housebreaking,—or being found by night, with his face blackened or otherwise disguised, with intent to commit a felony,—or being found by night in any dwelling house or building, with intent to commit a felony therein; *Id. s. 1*;—using chloroform, laudanum, or other stupifying drug, &c., with intent to enable or assist the offender or others to commit a felony; *Id. s. 3*;—inflicting grievous bodily harm with or without a weapon or instrument, or cutting, stabbing, or wounding any person; *Id. s. 4*;—malicious injuries to railways, with intent to obstruct, upset, or injure any engine, carriage, or truck, or to endanger the safety of any person travelling or being on the railway;—or maliciously casting or letting fall any wood, stone, &c., upon a railway carriage, engine, &c., with intent to endanger any person in such carriage, or on such engine, &c.; *Id. s. 7*; maliciously setting fire to a railway station or building, or goods therein. *Id. s. 8*.

And lastly, by the last-mentioned Act, 14 & 15 Vict. c. 19, s. 11, reciting that doubts had been entertained as to the authority to apprehend persons found committing indictable offences in the night, it is enacted, that it shall be lawful for any person whatsoever, to apprehend any person who shall be found committing any indictable offence by night, and to convey him or to deliver him to some constable or peace officer, in order to his being conveyed, as soon as conveniently may be, before a justice of the peace, to be dealt with according to law. Night here means the same as in burglary; *Id. s. 13*; namely, it commences at nine o'clock in the evening, and ends at six in the morning. 1 Vict. c. 86, s. 4.

In case of riots.] A private person may lawfully endeavour to prevent those whom he sees engaged in a riot or rout, from executing their purpose, and he may stop those whom he shall

see coming to join them, 1 *Hawk. c. 65, s. 11*, and may arrest those he sees engaged in it. And for this purpose, he may lawfully arm himself, and may make use of his arms, in suppressing the riot; but it is not prudent or advisable for private persons thus to use arms, of their own authority, in ordinary cases, as, under pretence of keeping the peace, they may be guilty of or cause enormous breaches of it; it is only in case of riots, which savour of rebellion, that such violent methods seem proper.

And what may thus be done by a private person, may also be done by the military, even although they be not at the time acting under the orders of a justice of peace. But they must be cautious not to use their arms in such a case, where there is no actual necessity, except indeed in their own defence in case they should be attacked.

Constables and other peace officers also, not only may do, but it is one of the duties of their office to do, all that in them lies, for the suppressing of the riot, [and the arrest of the rioters]; and they may command all other persons to assist them in doing so. 1 *Hawk. c. 65, s. 11*.

So, justices of the peace, by stat. 34 Ed. 3, c. 1, have power to restrain rioters, and to pursue, arrest, take, and chastise them, according to their trespass and offence, and to cause them to be imprisoned and duly punished according to the law and custom of the realm. If any justice of peace, therefore, find persons riotously assembled, he may not only arrest the offenders himself, and bind them over to keep the peace, and be of good behaviour, or imprison them until they find bail, but he may also authorize others to arrest them, by a mere verbal command without warrant; and the persons so commanded, may pursue and arrest the offenders, as well in his absence as in his presence. 1 *Hawk. c. 65, s. 16*. And if justices fail in their duty in this respect, it is a high misdemeanor, and punishable upon indictment or information with fine or imprisonment, or both. See *R. v. Pinney*, 3 B. & Ad. 947.

And by stat. 13 H. 4, c. 7, if any riot, assembly, or rout of people, against the law, be made in the realm, [whether in the presence of justices of the peace or in their absence, 1 *Hawk. c. 65, s. 22*,] the justices of the peace, three or two of them at the least, and the sheriff or under-sheriff of the county where such riot shall be made, shall come with the power of the county, if need be, to arrest them, and shall arrest them; and the same justices and sheriff or under-sheriff shall have power to record what they shall find so done in their presence against the law, and by that record such trespassers and offenders shall be convicted, in the manner and form contained in the statute of Forcible Entries. See 1 *Arch. J. P.* 467.

As to the power of the county, or *posse comitatus*, above

mentioned, it is enacted by stat. 2 H. 5, c. 8, s. 2, that the King's liege people (not being clergymen, women, persons decrepit, or infants under the age of fifteen), being sufficient to travel, shall be assistants to such justices, upon reasonable warning, to ride with them in aid to resist such riots, routs, and assemblies, on pain of imprisonment, and to make fine and ransom to the King. And it has been holden, that those who thus attend the justices, in order to suppress a riot, may take with them such weapons as shall be necessary to enable them effectually to do it; and that they may justify beating, wounding, or even killing such rioters as shall resist, or refuse to surrender themselves. 1 Hawk. c. 65, s. 21.

As to rioters remaining together after the riot act, or rather proclamation to disperse, has been read, and which is made a felony by statute 1 G. 1, st. 2, c. 5, s. 1, it is enacted by sect. 3 of that statute, that if such persons, so unlawfully, riotously, and tumultuously assembled, or twelve or more of them, after proclamation made in manner aforesaid, shall continue together and not disperse themselves within one hour, then it shall and may be lawful to and for every justice of the peace, sheriff, or under-sheriff of the county where such assembly shall be,—and also to and for every high and petty constable and other peace officer within such county,—and to and for also every mayor, justice of the peace, sheriff, bailiff, and other head officer, high or petty constable and other peace officer of any city or town corporate, where such assembly shall be,—and to and for such other person and persons as shall be commanded to be assisting unto any such justice of the peace, sheriff, &c., (who are hereby authorized and empowered to command all His Majesty's subjects of age and ability, to be assisting to them therein), to seize and apprehend, and they are hereby required to seize and apprehend, such persons so unlawfully, riotously, and tumultuously continuing together after proclamation made as aforesaid, and forthwith to carry the persons so apprehended before one or more of His Majesty's justices of the peace of the county or place where such person shall be so apprehended, in order to their being proceeded against for such their offences according to law. 1 G. 1, st. 2, c. 5, s. 3.

After offence committed.] Upon a strong case of suspicion, a private person may justify the apprehending of another for felony, if in fact a felony was committed. See *Beckwith v. Philby*, 6 B. & C. 635. But a suspicion that a man has committed a misdemeanor on a former occasion, will not justify a private person in giving him in charge to a constable; and there is no distinction in this respect between one kind of misdemeanor and another. *Fox v. Gaunt*, 3 B. & Ad. 798, and see *Matthews v. Biddulph*, 11 Law J. 13m. And even

in cases of felony, it is often imprudent in a private person to arrest for an offence formerly committed, at least unless he was present at the time the party committed it, and there is danger of his otherwise escaping. It is better for a private person to disclose his suspicion to the constable, and let him take upon himself the responsibility of arresting the suspected party, or to a justice of the peace, who may grant a warrant to a constable to apprehend him.

And if a reasonable charge of felony against a person be made to a constable, the constable will be justified in arresting him without warrant, although it afterwards turn out that the person was perfectly innocent, or that no felony in fact had been committed. *Samuel v. Payne et al.*, *Doug.* 359. *Hobbs v. Branscomb*, 3 *Camp.* 420. *Davis v. Russell*, 5 *Bing.* 354. *Cowles v. Dunbar*, *Moody & M.* 37. *R. v. Ford*, *R. & Ry.* 329. But it has been holden that a constable is not justified in apprehending a person as a receiver of stolen goods, on the mere assertion of the principal felon. *Isaacs v. Brand*, 2 *Stark.* 167. Nor is a constable justified in taking a person into custody for a mere assault, without a warrant, unless he himself was present at the time the assault was committed, *Coupey v. Henley*, 2 *Esp.* 540, or there be a reasonable ground for apprehending a continuance or renewal of it; *Baynes v. Brewster*, 11 *Law J.* 5m.; and the same as to all breaches of peace out of his view. 2 *Hawk.* c. 13, s. 8. *Id.* c. 12, s. 20.

Or if a constable have a reasonable suspicion that a man has committed felony, he may apprehend him. *Ledwith v. Catchpole*, *Cald.* 291. *Lawrence v. Hedger*, 3 *Taunt.* 14. *Nicolson v. Hardwick*, 5 *Car. & P.* 495. *Beckwith v. Philby*, 6 *B. & C.* 635. So may a private individual, as above mentioned. The difference between the authority of the constable and the private person in this respect is, that the latter is justified only in case it turn out that a felony was in fact committed, but the constable may justify the arrest and detention, whether in fact a felony was committed or not. *Beckwith v. Philby*, *supra*, per Lord Tenterden, C. J. And the ordinary grounds of justifiable suspicion are thus enumerated by Hawkins:—First, the common fame of the country; second, living a vagrant, idle, disorderly life, without any visible means to support it; third, being in company with known offenders at the time the offence was committed, or at other times; fourth, being found under circumstances inducing a strong presumption of guilt, as for instance, having stolen goods in his possession, and not being able to give an account of his having come honestly by them, or the like; fifth, behaving in such a way as to betray a consciousness of guilt, as by making no answer when charged with the offence, or absconding, or the like. 2 *Hawk.* c. 12, s. 8-14; and see stat. 8 & 9 *Vict.* c. 25, s. 13, *infra*.

In prevention of offences.] If a private person see another on the point of committing treason or felony, or doing an act which would manifestly endanger the life of another, he may lay hold on him and detain him until it may be presumed that he has changed his purpose. 2 *Hawk. c. 12, s. 19*. So may a constable. And by stat 8 & 9 Vict. c. 25, relating to the destroying or damaging of houses with gunpowder or other explosive substances, or burning, disabling, or disfiguring persons with the like, it is enacted by sect. 13, that it shall be lawful for any constable or peace officer, to take into custody, without warrant, any person whom he shall find lying or loitering in any highway, yard, or other place, during the night, and whom he shall have good cause to suspect of having committed or being about to commit any felony under this Act, and to detain such person until he can be brought before a justice of the peace to be dealt with according to law.

By constable.] I have nearly exhausted this subject in the foregoing observations. It is clear that a constable may do all that a private person can legally do, without warrant, in apprehending offenders, or persons about to commit crimes; the principal difference being, that the private person must deliver the party apprehended into the custody of a constable, unless otherwise directed by statute, and the constable must convey, as well those whom he apprehends, as those who are delivered to him by private persons, before a justice of the peace, there to be dealt with as shall hereafter be explained, and in the mean time he must provide for their safe custody, by lodging them in a station-house in cities or towns, or in a lockup-house in the country, or otherwise. 2 *Hawk. c. 13, s. 7*.

Constables may interfere to prevent an affray, in their presence, in the same manner as a private person, and it is more particularly their duty to do so. 2 *Hawk. c. 13, s. 8*. But after the affray is over, they cannot, any more than a private person, apprehend the affrayers without warrant. *Id.* And the same as to all breaches of the peace, *Id.*, or any other misdemeanors, see *Fox v. Gaunt*, 3 *B. & Ad.* 798, committed out of their view.

There is one peculiarity in the constable's interference, namely, that he may demand the assistance of any person present, to enable him to execute his duty; 2 *Hawk. c. 13, s. 7*, and see *R. v. Phelps et al.*, *Car. & M.* 180; and if such person refuse his assistance, he may be indicted and punished as for a misdemeanor at common law. See *R. v. Brown*, *Car. & M.* 314.

By magistrates.] I have already stated the duties of a magistrate in the case of a riot. In other respects, he may do

every thing which a constable or private person may do, in respect of apprehending offenders without warrant. 2 *Hawk. c. 13, s. 13*. So, he may lawfully, by word of mouth, authorize any one to arrest a person, who is guilty of a felony or an actual breach of the peace in his presence; 2 *Hawk. c. 13, s. 14*; 2 *Hale, 86*; and such command is a good warrant without writing. 2 *Hale, 86*.

On hue and cry.] Upon hue and cry raised or levied, a private person may arrest the alleged offender, 2 *Hawk. c. 13, s. 4*, although no other circumstance of suspicion attach to him. 2 *Inst. 52*. Hue and cry was the ancient mode of pursuing an offender from town to town, until he was taken. 2 *Hawk. c. 12, s. 5*. It might be raised by any person present when a felony was committed, or dangerous wound given, by going to the constable of the next town, informing him of it, describing the offender, and stating which way he had gone. *Id. ss. 4, 5*. It was the duty of the constable then immediately to raise his own town, and search for the offender, and, upon not finding him, to send the like notice to the constables of all the neighbouring towns, who ought in like manner to search for the offender, and also to give notice to their neighbouring constables, and they to the next, until the offender was taken. *Id. s. 6*. Sometimes there was a justice's warrant for levying the hue and cry; but the constable might levy it without warrant. If a constable fail to levy a hue and cry when he ought, or if others do not pursue it when required, they are punishable upon indictment with fine or imprisonment, or both. 3 *Inst. 117*. 3 *Ed. 1 c. 9*.

When and where.] An arrest without warrant may be made at any time, even on a Sunday. And it may be made any where.

How.] An arrest is usually made by laying hands on the party and detaining him. But if the officer or other person say to him "I arrest you," and the party acquiesce and go with him, this will be a good arrest; see *Russen v. Lucas*, 1 *Car. & P. 153*; although it would be otherwise, if instead of submitting he had escaped. *Id.* If the arrest be by a constable, it is sufficient for him to state merely that he arrests the party in the Queen's name; 1 *Hale, 589*; but a private person, it should seem, if required, must state to the party arrested the cause of the arrest.

If the party to be arrested be in a house, and the doors be fastened, then, according to Hawkins, the doors may be broken open to arrest him (after first demanding admittance and being refused), in the following cases:—First, upon a *capias* on an indictment; second, where one, known to have committed treason or felony, or to have given another a dan-

gious wound, is pursued by a constable or private person, with or without warrant; third, where an affray is made in a house, in the view or hearing of a constable, or where affrayers fly to a house and are immediately pursued by a constable; fourth, where a person, lawfully arrested, escapes and flies to a house: in these several cases the door of the house may be broken open, to arrest the party or suppress the affray, if upon demand made for the purpose the parties within refuse to open it. 2 Hawk. c. 14, ss. 1—9. And the same, upon a warrant on a charge or suspicion of felony. 2 Hale, 117. So, where a private person, without warrant, broke open the door of a house, and imprisoned the occupier, to prevent him from murdering his wife, he was holden to be justified. *Handcock v. Baker*, 2 Bos. & P. 260. And it is immaterial whether it be the party's own house, or the house of a stranger, except that in the latter case the officer is justified only in case the party he seeks be actually in the house at the time. 2 Hale, 117.

If the officer or other person, in endeavouring to make a legal arrest, be resisted, and in opposing force to force he happen to kill the party, the homicide is justifiable; 1 Hale, 494, 481; *Fost.* 318, 274; and the officer or other person need not retreat, as in the ordinary case of *se defendendo*; 2 Hale, 218; but if the arrest would have been illegal, the killing would amount to manslaughter. See *Fost.* 318. So when a party may lawfully be arrested for felony, and he, knowing the cause, flies, so that he cannot be taken otherwise than by killing him, the constable pursuing him will be justified in killing him; or a private person will in like manner be justified, if he can prove that the deceased was actually guilty of a felony; 2 Hale, 118, 119. 1 East, P. C. 298, 299; but where the arrest is for a misdemeanor only, even a constable will not be justified in killing in pursuit; and if in such a case he kill with a deadly weapon, it will be murder; if otherwise, manslaughter; 2 Hale, 217. *Fost.* 271; and see *R. v. Longden*, R. & Ry. 228. *R. v. Smith*, 1 Russ, 459; or if he fire at and wound him, he may be indicted for it as for a felony under stat. 1 Vict. c. 85. *R. v. Dodson*, 20 Law J. 57 m. In apprehending or dispersing rioters after proclamation made, as mentioned *ante*, p. 25, it is enacted by stat. 1 G. 1, st. 2, c. 5, s. 3, that if the persons so unlawfully, riotously, and tumultuously assembled, or any of them, shall happen to be killed or hurt, by reason of their resisting the persons endeavouring to disperse or apprehend them, the latter shall be discharged and indemnified.

On the other hand, if the constable or any person acting in his aid be killed in endeavouring to execute a magistrate's warrant,—if the warrant be legal and the slayer had notice, either expressly or from circumstances, of the deceased being a constable, and of the intent of the arrest, *R. v. Gordon*, 1 East,

P. C. 350, 352. *R. v. Payne, Ry. & M.* 378, the law in that case implies malice, and the slayer will be guilty of murder. 1 *Hale*, 457. 1 *East, P. C.* 298. And the same, as to killing any other person to whom the warrant is directed. But if the warrant be bad on the face of it, as being too general, *R. v. Hood, Ry. & M.* 281, or the like, the killing in such a case will be manslaughter only. So, if a constable or other person, without warrant, apprehend, or attempt to apprehend an offender, in a case where by law he may do so, and be killed in so doing, it will be murder; 1 *East, P. C.* 303. *R. v. Ford, R. & Ry.* 329. *R. v. Woolmer & Palmer, Ry. & M.* 334. *R. v. Hems, 7 Car. & P.* 312; but if it happen in a case where he has no authority by law to apprehend the party, the killing will be manslaughter only. *R. v. Wm. Thompson, Ry. & M.* 80. *R. v. Curran, Ry. & M.* 132. *R. v. Curran, 3 Car. & P.* 397. *R. v. Davis, 7 Car. & P.* 785. *R. v. Phelps et al., Car. & M.* 180. So, if a game-keeper or his assistant be killed, in attempting to apprehend a poacher, if the arrest would have been lawful, the offence is murder; *R. v. Warner et al., Ry. & M.* 380; *R. v. Edwards et al., 3 Car. & P.* 390; *R. v. Whithorne et al., Id.* 394; *R. v. Ball, Ry. & M.* 330; *R. v. James Ball, Id.* 333; but if the arrest would have been unlawful, the offence would be manslaughter only; *R. v. Addis, 6 Car. & P.* 388. Even an assault to prevent apprehension, is punishable with imprisonment, with or without hard labour, for not more than two years. 9 *G. 4, c. 31, s. 25, and see 14 & 15 Vict. c. 19, s. 12.* Or if, to resist or prevent lawful apprehension, a man shoot at, or attempt to shoot at the party attempting to apprehend him, or shall stab, cut or wound him, it will be a felony, and he will be liable to be transported for life, or for not less than fifteen years, or to be imprisoned with or without hard labour for not more than three years. 1 *Vict. c. 85, s. 4.*

SECTION II.

Apprehension of the Offender under a Warrant.

Warrant, in what cases and how.] Where a charge or complaint is made before a justice of the peace, that a person who has committed, or is suspected to have committed any treason, felony, or indictable misdemeanor, or any other indictable offence whatsoever, either within the justice's jurisdiction or elsewhere, is residing or being, or is suspected to reside or be within the limits of such jurisdiction,—the justice may at once issue his warrant to apprehend such person, and to cause him to be brought before him or some other justice for the same county, riding, division, liberty, city, borough, or

place, to answer to the charge; 11 & 12 Vict. c. 42, s. 1. This warrant may be issued on a Sunday, as well as any other day. *Id.* s. 4. It must be under the hand and seal of the justice issuing it; and it may be directed—either to a constable or other person by name,—or generally to the constable of the parish or other district within which it is to be executed, without naming him,—or to such constable and all other constables or peace officers in the county or other district within which the justice issuing the warrant has jurisdiction,—or generally to all constables or peace officers within such county or district. *Id.* s. 10.

The following is the form of the

Information or Complaint for an Indictable Offence.

_____ } The information and complaint of C. D., of
to wit: } ———, [yeoman], taken this ——— day of ———,
in the year of our Lord, 185—, before the undersigned, [one]
of Her Majesty's justices of the peace, in and for the said
[county] of ———, who saith that [&c., stating the offence].
Sworn before [me] the day and year first before men-
tioned, at ———. J. S.

This information is required to be on oath, where it is intended to issue a warrant in the first instance. 11 & 12 Vict. c. 42, s. 8.

The following is the form of the

Warrant to apprehend the Offender.

To the constable of ———, and to all other peace officers
in the said [county] of ———.

Whereas, A. B., [labourer] hath this day been charged upon oath before the undersigned, [one] of Her Majesty's justices of the peace in and for the said county of ———, for that he, on ———, at ———, did [&c., stating shortly the offence]: These are therefore to command you, in Her Majesty's name, forthwith to apprehend the said A. B., and to bring him before [me], or some other of Her Majesty's justices of the peace in and for the said [county], to answer unto the said charge, and to be further dealt with according to law.

Given under my hand and seal, this ——— day of ———, in the year of our Lord ———, at ———, in the [county] aforesaid.
J. S. [L.S.]

Or summons and warrant.] The justice, however, instead of issuing a warrant in the first instance, may, if he think fit, issue a summons; and if that be disobeyed, he may then issue his warrant. 11 & 12 Vict. c. 42, ss. 1, 9. In the case of a

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summons, it is not necessary that the information should be upon oath; it need not even be in writing. *Id.* s. 8.

The following is the form of a

Summons to a Person charged with an Indictable Offence.

To A. B., of —, [labourer.]

Whereas you have this day been charged before the undersigned, [one] of Her Majesty's justices of the peace in and for the said [county] of —, for that you, on —, at —, [&c., stating shortly the offence]: These are therefore to command you, in Her Majesty's name, to be and appear before me on —, at — o'clock in the forenoon, at —, or before such other justice or justices of the peace for the same [county] as may then be there, to answer to the said charge, and to be further dealt with according to law. Herein fail not.

Given under my hand and seal, this — day of —, in the year of our Lord —, at —, in the [county] aforesaid.

J. S. [L.S.]

This summons, it will be perceived, is directed to the party himself, who is charged by the information. It must be served by a constable or other peace officer, either by delivering it to the party personally, or, if he cannot conveniently be met with, by leaving it with some person for him at his last or most usual place of abode. 11 & 12 Vict. c. 42, s. 9.

If the party fail to attend at the time and place mentioned in the summons, then, upon oath made of the service of the summons, the justice may issue his warrant; 11 & 12 Vict. c. 42, s. 9; or if he see any necessity for it, as if he be informed that the party is likely to abscond, or the like, he may issue his warrant before the day of attendance mentioned in the summons. *Id.* s. 1.

The following is the form of the

Warrant where the Summons is disobeyed.

To the constable of —, and to all other peace officers in the said [county] of —.

Whereas on the — last past, A. B., of —, [labourer,] was charged before the undersigned, [one] of Her Majesty's justices of the peace in and for the said [county] of —, for that [&c., as in the summons]: And whereas [I] then issued [my] summons to the said A. B., commanding him,

in Her Majesty's name, to be and appear before [me] on —, at — o'clock in the forenoon, at —, or before such other justice or justices of the peace for the same [county] as might then be there, to answer to the said charge, and to be further dealt with according to law: and whereas the said A. B. hath neglected to be or appear at the time and place appointed in and by the said summons, although it hath now been proved to me upon oath that the summons was duly served upon the said A. B.: These are therefore to command you, in Her Majesty's name, forthwith to apprehend the said A. B., and to bring him before me, or some other of Her Majesty's justices of the peace in and for the said [county], to answer to the said charge, and to be further dealt with according to law.

Given under my hand and seal, this — day of —, in the year of our Lord —, at —, in the county aforesaid.

J. S. [L.S.]

Warrant, how and where executed.] The arrest, as we have already seen, is usually made by actually laying hands on the party, and detaining him. But if the officer or other person say to him "I arrest you," and the party acquiesce and go with him, this will be a good arrest; see *Russen v. Lucas*, 1 Car. & P. 158; although it would be otherwise, if, instead of submitting, he had escaped; *Id.*; and merely showing him the warrant, and his then voluntarily accompanying the officer to a magistrate, would not be in law an arrest. *Arrowsmith v. Le Mesurier*, 2 New Rep. 211. If the party arrested demand to see the warrant, the constable, if he be a known officer, and acting within his precinct, is not in strictness bound to show it to him; but otherwise, where the arrest is by a constable out of his precinct, or by a private person; 2 Hawk. c. 13, s. 28; and where the arrest is without warrant, it is sufficient for a constable to state merely that he arrests the party in the Queen's name; 1 Hale, 589; but a private person, if required, must, it should seem, state to the party the cause of the arrest. As to breaking open doors, for the purpose of making an arrest, see *ante*, p. 28; and as to the death of, or injury to, either party,—the party arresting or arrested,—in the endeavour to make or avoid the arrest, see *ante*, p. 29.

If the person against whom the warrant has issued, be not found within the jurisdiction of the justice who issued it, or if he shall escape, go into, reside, or be, or be supposed or suspected to be in any place in England or Wales, the constable, on taking the warrant to any justice of the peace there, and making oath as to the handwriting of the justice to the warrant, the justice to whom he shall present it, will back the warrant, that is, he will indorse on it an authority for the

constable and all other peace officers to execute the warrant within his jurisdiction. 11 & 12 Vict. c. 42, s. 11.

The following may be the form of the

Indorsement in Backing a Warrant.

— } Whereas proof upon oath hath this day been made to wit. } before me, one of Her Majesty's justices of the peace for the said county of —, that the name of J. S., to the within warrant subscribed, is of the handwriting of the justice of the peace within mentioned: I do therefore hereby authorize W. T., who bringeth to me this warrant, and all other persons to whom this warrant was originally directed, or by whom it may lawfully be executed, and also all other constables and other peace officers of the said [county] of —, to execute the same within the said last-mentioned county; [and the justice, if he think fit, may add] — and to bring the said A. B., if apprehended within the said county, before me, or some other justice or justices of the peace of the same county, to be dealt with according to law.

Given under my hand, this — day of —, 185—.

J. L.

In like manner, English warrants may be backed in Ireland, 11 & 12 Vict. c. 42, s. 12, or Scotland, *Id.* s. 14, or the Isle of Man, *Id.* s. 13, or in the Islands of Guernsey, Jersey, Alderney, or Sark. *Id.* s. 13, and 14 & 15 Vict. c. 55, s. 18.

In the case of a search warrant, the warrant, after directing the constable to search for the goods in the dwelling-house, &c., of A. B., orders him that if the same or any part thereof be found upon such search, to bring the goods so found, as also the body of the said A. B., before the justice issuing the warrant, or some other justice or justices of the peace for the county, to be disposed of and dealt with according to law. See 2 Arch. J. P. 445, 446. Accordingly, if the constable find the goods, he arrests the party as directed.

When the party is arrested, the constable should take him before a justice of the peace, as soon as it is possible for him to do so, see *Wright & Court*, 4 B. & C. 596, and in the mean time he should keep or lodge him in safe custody. 2 Hale, 120. And the same, where the arrest is by a private person without warrant, he may deliver the party to a constable, or he may take him before a justice of the peace. 1 Hale, 589. And the party arrested should not be treated with any unnecessary harshness, beyond what is actually necessary for his safe custody; and therefore it has been holden, that a constable has no right to handcuff a person whom he has apprehended on a suspicion of felony, unless he have attempted to escape, or it

be necessary to prevent him from escaping. *Wright v. Court, supra.*

Warrant for offences at sea or abroad.] In all cases of "indictable crimes or offences of any kind or nature whatsoever, committed on the high seas, or in any creek, haven, or other place in which the Admiralty of England have or claim to have jurisdiction,—and in all cases of crimes or offences committed on land beyond the seas, for which an indictment may legally be preferred in any place within England or Wales," any one or more of Her Majesty's justices of the peace for the county, &c., in which the offenders shall reside or be, or shall be supposed or suspected to reside or be, may issue a warrant to apprehend him. 11 & 12 Vict. c. 42, s. 2. The warrant is the same as the form, *ante*, p. 31, except that in describing an offence upon the high seas, the warrant states it to have been committed "*on the high seas, out of the body of any county of this realm, and within the jurisdiction of the Admiralty of England;*" and in describing an offence committed abroad, for which the offenders may be indicted in this country, the warrant states it to have been committed "*on land out of the United Kingdom, to wit, at —, in the kingdom of —,*" or "*at —, in the East Indies,*" or "*in the island of —, in the West Indies,*" as the case may be. *Id. sched. E.* The warrant is executed as in ordinary cases.

SECTION III.

The Examination and Commitment, &c.

1. *In cases where the arrest is in the same county, &c., where the offence was committed.*

Taking the depositions.] By stat. 11 & 12 Vict. c. 42, s. 17, in all cases where any person shall appear or be brought before any justice of the peace, charged with any indictable offence, whether committed in England or Wales, or upon the high seas, or on land beyond the sea, or whether such person appear voluntarily upon summons, or have been apprehended with or without warrant, or be in custody for the same or any other offence,—such justice, before he shall commit such accused person for trial, or before he shall admit him to bail, shall, in the presence of such accused person (who shall be at liberty to put questions to any witness produced against him), take the statement on oath or affirmation of those who shall know the facts and circumstances of the case, and shall put the same into writing; and such depositions shall be read over to and signed by the witness, and shall be signed also by

the justice; and before each witness is examined, the justice shall administer to him the usual oath or affirmation.

The following may be the form of the

Depositions.

——— } *The examination of C. D. of —— [farmer] and
to wit. } E. F. of —— [labourer], taken on [oath] this ——
day of ——, in the year of our Lord ——, at ——, in the
[county] aforesaid, before the undersigned, [one] of Her
Majesty's justices of the peace for the said [county], in the
presence and hearing of A. B., who is charged this day
before [me], for that he the said A. B. on ——, at —— [&c.
describing the offence as in a warrant of commitment].*

*This deponent C. D., on his [oath], saith as follows: [&c.
stating the deposition of the witness as nearly as possible in
the words he uses. When his deposition is complete let him
sign it].*

*And this deponent E. F., upon his oath, saith as follows,
[&c.]*

*The above depositions of C. D. and E. F. were taken and
[sworn] before me at ——, on the day and year first above
mentioned.*

J. S.

Remand.] If, from the absence of witnesses, or from any other reasonable cause, it shall become necessary or advisable to defer the examination or further examination of the witnesses for any time, the justice before whom the accused shall appear or be brought, may by his warrant, from time to time remand the party accused for such time as by such justice in his discretion shall be deemed reasonable, not exceeding eight clear days, to the common gaol or house of correction, or other prison, lock-up house or place of security in the county, riding, division, liberty, city, borough, or place for which such justice shall then be acting; or if the remand be for a time not exceeding three clear days, it shall be lawful for the justice verbally to order the constable or other person in whose custody such party accused may then be, or any other constable or person to be named by the said justice in that behalf, to continue or keep such party accused in his custody, and to bring him before the same or such other justice or justices as shall be there acting at the time appointed for continuing such examination: it is provided, however, that the justice may order the accused to be brought before him at any time before the expiration of the time for which such accused party shall be so remanded, and the gaoler or officer in whose cus-

today he shall then be, shall duly obey such order. 11 & 12 Vict. c. 42, s. 21.

The following may be the form of the

Warrant remanding a Prisoner.

To the constable of — and to the [keeper of the house of correction] at —, in the said [county] of —.

Whereas A. B. was this day charged before the undersigned, [one] of Her Majesty's justices of the peace in and for the said [county] of —, for that [&c., as in the warrant to apprehend]; and it appears to me to be necessary to remand the said A. B.: These are therefore to command you the said constable, in Her Majesty's name, forthwith to convey the said A. B. to the [house of correction] at —, in the said [county], and there to deliver him to the keeper thereof, together with this precept; and I hereby command you the said keeper to receive the said A. B. into your custody in the said house of correction, and there safely keep him until the — day of — instant, when I hereby command you to have him at —, at — o'clock in the forenoon of the same day, before me or before such other justice or justices of the peace for the said [county] as may then be there, to answer further to the said charge, and to be further dealt with according to law, unless you shall be otherwise ordered in the meantime.

Given under my hand and seal, this — day of —, in the year of our Lord —, at —, in the [county] aforesaid.
J. S. [L. S.]

Or, instead of detaining the accused party in custody during the period for which he shall be so remanded, any one justice of the peace before whom such accused party shall so appear or be brought as aforesaid may discharge him, upon his entering into a recognizance, with or without a surety or sureties, at the discretion of such justice, conditioned for his appearance at the time and place appointed for the continuance of such examination; and if such accused party shall not afterwards appear at the time and place mentioned in such recognizance, then the said justice, or any other justice of the peace who may then and there be present, upon certifying on the back of the recognizance the non-appearance of such accused party, may transmit such recognizance to the clerk of the peace of the county, riding, division, liberty, city, borough, or place within which such recognizance shall have been taken, to be proceeded upon in like manner as other recognizances, and such certificate shall be deemed sufficient *prima facie*

evidence of such non-appearance of the said accused party. 11 & 12 Vict. c. 42, s. 21.

The following may be the form of the

Recognizance.

Be it remembered, that on the — day of —, in the year of our Lord —, A. B. of —, [labourer], L. M., of —, [grocer], and N. O., of —, [butcher], personally came before me, [one] of Her Majesty's justices of the peace for the said [county], and severally acknowledged themselves to owe to our lady the Queen the several sums following: that is to say, the said A. B., the sum of —, and the said L. M., and N. O., the sum of — each, of good and lawful money of Great Britain, to be made and levied of their several goods and chattels, lands and tenements respectively, to the use of our said lady the Queen, her heirs and successors, if he the said A. B. fail in the condition indorsed.

Taken and acknowledged, the day and year first above mentioned, at —, before me,

J. S.

Condition.

The condition of the within-written recognizance is such, That whereas the within-bounden A. B., was this day [or on — last past] charged before me, for that [&c., as in the warrant]: And whereas the examination of the witnesses for the prosecution in this behalf is adjourned until the — day of — instant; if therefore the said A. B. shall appear before me on the said — day of — instant, at — o'clock in the forenoon, or before such other justice or justices of the peace for the said [county] as may then be there, to answer [further] to the said charge, and to be further dealt with according to law, then the said recognizance to be void, or else to stand in full force and virtue.

Notice of such Recognizance to be given to the Accused and his Sureties.

Take notice, that you, A. B., of —, are bound in the sum of —, and your sureties L. M. and N. O., in the sum of — each, that you, A. B., appear before me J. S., one of Her Majesty's justices of the peace for the [county] of —, on — the — day of — instant, at — o'clock in the forenoon, at —, or before such other justice

or justices of the peace for the same [county] as may then be there, to answer further to the charge made against you by C. D., and to be further dealt with according to law; and unless you A. B., personally appear accordingly, the recognizances entered into by yourself and sureties will be forthwith levied on you and them. Dated this — day of —, 185—.

J. S.

Certificate of Non-appearance to be endorsed on the Recognizance.

I hereby certify, that the said A. B. hath not appeared at the time and place in the above condition mentioned, but therein hath made default; by reason whereof the within-written recognizance is forfeited.

J. S.

Summons of Witness.

By stat. 11 & 12 Vict. c. 42, s. 16, if it shall be made to appear to any justice of the peace, by the oath or affirmation of any credible person, that any person within the jurisdiction of such justice is likely to give material evidence for the prosecution, and will not voluntarily appear for the purpose of being examined as a witness at the time and place appointed for the examination of the witnesses against the accused,—such justice may and is hereby required to issue his summons to such person, under his hand and seal, requiring him to be and appear at a time and place mentioned in such summons before the said justice, or before such other justice or justices of the peace for the same county, &c., as shall then be there, to testify what he shall know concerning the charge made against such accused party; and if any person so summoned shall neglect or refuse to appear at the time and place appointed by the said summons, and no just excuse shall be offered for such neglect or refusal, then (after proof upon oath or affirmation of such summons having been served upon such person, either personally or by leaving the same for him with some person at his last or most usual place of abode,) it shall be lawful for the justice or justices before whom such person should have appeared to issue a warrant under his or their hands and seals to bring and have such person at a time and place to be therein mentioned before the justice who issued the said summons, or before such other justice or justices of the peace for the same county, &c., as shall then be there, to testify as aforesaid, and which said warrant may, if necessary,

be backed as herein-before is mentioned, in order to its being executed out of the jurisdiction of the justice who shall have issued the same ; or, if such justice shall be satisfied by evidence upon oath or affirmation, that it is probable that such person will not attend to give evidence without being compelled so to do, then, instead of issuing such summons, it shall be lawful for him to issue his warrant in the first instance, and which, if necessary, may be backed as aforesaid.

The following is the form of the

Summons.

To E. F., of —, [labourer].

Whereas information hath been laid before the undersigned, [one] of Her Majesty's justices of the peace in and for the said [county] of —, that A. B. [&c., as in the summons or warrant against the accused], and it hath been made to appear to me upon [oath] that you are likely to give material evidence for the [prosecution]: These are therefore to require you to be and to appear before me, on — next, at — o'clock in the forenoon, at —, or before such other justice or justices of the peace for the same county as may then be there, to testify what you shall know concerning the said charge so made against the said A. B. as aforesaid. Herein fail not.

Given under my hand and seal, this — day of —, in the year of our Lord —, at —, in the [county] aforesaid.

J. S. [L. S.]

Warrant where a Witness has not obeyed a Summons.

To the constable of —, and to all other peace officers in the said [county] of —.

Whereas information having been laid before the undersigned, [one] of Her Majesty's justices of the peace in and for the said [county] of —, that A. B. [&c., as in the summons]; and it having been made to appear to [me] upon oath that E. F. of —, [labourer] was likely to give material evidence for the prosecution, I did duly issue my summons to the said E. F., requiring him to be and appear before me, on —, at —, or before such other justice or justices of the peace for the same county as might then be there, to testify what he should know respecting the said charge so made against the said A. B. as aforesaid: and whereas proof hath this day been made before me upon oath of such summons having been duly served upon the said E. F.: and whereas the said E. F. hath neglected to appear at the

time and place appointed by the said summons, and no just excuse has been offered for such neglect : these are therefore to command you to bring and have the said E. F., before me on —, at — o'clock in the forenoon, at —, or before such other justice or justices of the peace for the same [county] as may then be there, to testify what he shall know concerning the said charge so made against the said A. B., as aforesaid.

Given under my hand and seal, this — day of —, in the year of our Lord —, at —, in the [county] aforesaid.
J. S. [L. S.]

Warrant for a Witness in the first instance.

To the constable of —, and to all other peace officers in the said [county] of —.

Whereas information hath been laid before the undersigned, [one] of Her Majesty's justices of the peace in and for the said [county] of —, that [&c., as in summons]; and it having been made to appear to [me] upon oath that E. F., of —, [labourer] is likely to give material evidence for the prosecution, and that it is probable that the said E. F. will not attend to give evidence without being compelled so to do : these are therefore to command you to bring and have the said E. F. before me on —, at — o'clock in the forenoon, at —, or before such other justice or justices of the peace for the same [county] as may then be there, to testify what he shall know concerning the said charge so made against the said A. B. as aforesaid.

Given under my hand and seal, this — day of —, in the year of our Lord —, at —, in the [county] aforesaid.
J. S. [L. S.]

If on the appearance of such person so summoned before the said last-mentioned justice or justices, either in obedience to the said summons, or upon being brought before him or them by virtue of the said warrant, such person shall refuse to be examined upon oath or affirmation concerning the premises, or shall refuse to take such oath or affirmation, or, having taken such oath or affirmation, shall refuse to answer such questions concerning the premises as shall then be put to him, without offering any just excuse for such refusal, any justice of the peace then present, and having there jurisdiction, may by warrant under his hand and seal commit the person so refusing to the common gaol or house of correction for the county, riding, division, liberty, city, borough, or place where such person so refusing shall then be, there to remain and be imprisoned for any time not exceeding seven days, unless he

shall in the mean time consent to be examined and to answer concerning the premises. 11 & 12 Vict. c. 42, s. 16.

The following may be the form of the

Warrant of Commitment of a Witness for refusing to be sworn or to give Evidence.

To the constable of —, and to the keeper of the [house of correction] at —, in the said [county] of —.

Whereas A. B. was lately charged before the undersigned, [one] of Her Majesty's justices of the peace in and for the said [county] of —, for that [&c., as in the summons]; and it having been made to appear to [me] upon oath that E. F., of —, was likely to give material evidence for the prosecution. I duly issued my summons to the said E. F., requiring him to be and appear before me, on —, at —, or before such other justice or justices of the peace as should then be there, to testify what he should know concerning the said charge so made against the said A. B., as aforesaid; and the said E. F. now appearing before me [or being brought before me by virtue of a warrant in that behalf, to testify as aforesaid], and being required to make oath or affirmation as a witness in that behalf, hath now refused so to do [or being duly sworn as a witness doth now refuse to answer certain questions concerning the premises which are here put to him], without offering any just excuse for such his refusal: these are therefore to command you the said constable to take the said E. F., and him safely convey to the [house of correction] at —, in the county aforesaid, and there deliver him to the said keeper thereof, together with this precept; and I do hereby command you the said keeper of the said [house of correction] to receive the said E. F. into your custody in the said [house of correction], and him there safely keep for the space of — days for his said contempt, unless he shall in the meantime consent to be examined and to answer concerning the premises; and for your so doing this shall be your sufficient warrant.

Given under my hand and seal, this — day of —, in the year of our Lord —, at —, in the [county] aforesaid.

J. S. [L.S.]

Defence.] After the examinations of the witnesses on the part of the prosecution have been completed, the justice of the peace, or one of the justices, by or before whom such examination shall have been so completed, shall read or cause to be read to the accused the depositions taken against him, and shall say to him these words, or words to the like effect: "Having heard the evidence, do you wish to say anything in answer to the charge? you are not obliged to say anything

unless you desire to do so, but whatever you say will be taken down in writing, and may be given in evidence against you upon your trial ;” and whatever the prisoner shall then say in answer thereto, shall be taken down in writing, and read over to him, and shall be signed by the said justice or justices, and kept with the depositions of the witnesses, and shall be transmitted with them as herein-after mentioned ; and afterwards upon the trial of the said accused person, the same may, if necessary, be given in evidence against him, without further proof thereof, unless it shall be proved that the justice or justices purporting to sign the same did not in fact sign the same. 11 & 12 Vict. c. 42, s. 18.

Whatever the prisoner says after being thus cautioned, if it be taken down and transmitted with the depositions, may be read against the prisoner at the trial, without further proof. *R. v. Sansome*, 19 Law J. 143 m.

The following is the form of taking down

The Prisoner's Statement.

—: *A. B. stands charged before the undersigned, [one] of Her Majesty's justices of the peace in and for the [county] aforesaid, this — day of —, in the year of our Lord —, for that he the said A. B. on —, at —, [&c., as in the caption of the depositions]; and the said charge being read to the said A. B., and the witnesses for the prosecution, C. D. and E. F., being severally examined in his presence, the said A. B. is now addressed by me as follows: “ Having heard the evidence, do you wish to say anything in answer to the charge? you are not obliged to say anything unless you desire to do so ; but whatever you say will be taken down in writing, and may be given in evidence against you upon your trial ;” whereupon the said A. B. saith as follows :*

[Here state whatever the prisoner may say, and in his very words, as nearly as possible. Get him to sign it if he will.]

A. B.

Taken before me at —, the day and year first above mentioned.

Also, for the purpose of preventing the defendant being misled by any promises or threats which may have been previously holden out to him by the prosecutor, constable, or others, to induce him to make any confession,—it is provided by the same section, that the said justice or justices, before such accused person shall make any statement, shall state to him, and give him clearly to understand, that he has nothing to hope from any promise of favour, and nothing to fear from any threat, which may have been holden out to him to induce him to make any admission or confession of his guilt, but that whatever he shall

then say may be given in evidence against him upon his trial, notwithstanding such promise or threat : provided nevertheless, that nothing herein enacted or contained shall prevent the prosecutor in any case from giving in evidence any admission or confession or other statement of the person accused or charged, made at any time, which by law would be admissible as evidence against such person. 11 & 12 Vict. c. 42, s. 18. The only effect of this however is, to enable the prosecutor to give in evidence upon the trial any confession of the prisoner made after it, notwithstanding any promise or threat previously made ; the omission of it does not in the slightest degree prevent the prosecutor from giving in evidence a confession made before the justice in the prisoner's statement above mentioned, after the usual cautions, *R. v. Sansome, supra* ; *R. v. Bond*, 19 *Law J.* 138 *m.*, or a confession made at any other time, which was not induced by any promise or threat. This subject shall be more fully treated of hereafter, under the head of evidence.

It is necessary to mention, that no objection shall be taken or allowed to any summons or warrant against a party accused, for any defect therein in substance or in form, or for any variance between it and the evidence adduced on the part of the prosecution before the justice or justices who shall take the examinations of the witnesses in that behalf, as herein-before mentioned ; but if any such variance shall appear to such justice or justices to be such that the party charged has been thereby deceived or misled, it shall be lawful for such justice or justices, at the request of the party so charged, to adjourn the hearing of the case to some future day, and in the meantime to remand the party so charged, or to admit him to bail, in manner already mentioned, *ante*, p. 36, 37.—11 & 12 Vict. c. 42, ss. 9, 10.

Discharge and commitment.] When all the evidence offered upon the part of the prosecution against the accused party shall have been heard, if the justice shall be of opinion that it is not sufficient to put the accused upon his trial for any indictable offence, he shall forthwith order him, if in custody, to be discharged as to the information then under inquiry ; but if in the opinion of the justice such evidence is sufficient to put the accused party upon his trial for an indictable offence, or if the evidence given raise a strong or probable presumption of the guilt of such accused party, then such justice shall, by his warrant, commit him to the common gaol or house of correction for the county, riding, division, liberty, city, borough, or place to which by law he may now be committed, or, in the case of an indictable offence committed on the high seas, or on land beyond the sea, to the common gaol of the county, riding, division, liberty, city, borough, or place within which such justice or justices shall have jurisdiction,

to be there safely kept until he shall be thence delivered by due course of law,—or admit him to bail, as herein-after mentioned. 11 & 12 Viet. c. 42, s. 25.

The following is the form of the

Warrant of Commitment.

To the constable of — and to the keeper of the [house of correction] at —, in the said [county] of —.

Whereas A. B. was this day charged before me, J. S., [one] of Her Majesty's justices of the peace in and for the said [county] of —, on the oath of C. D., of —, [farmer,] and others, for that [&c., stating shortly the offence] : These are therefore to command you, the said constable of —, to take the said A. B., and him safely to convey to the [house of correction] at — aforesaid, and there to deliver him to the keeper thereof, together with this precept: and I do hereby command you, the said keeper of the said [house of correction], to receive the said A. B. into your custody in the said [house of correction], and there safely keep him until he shall be thence delivered by due course of law.

Given under my hand and seal, this — day of —, in the year of our Lord —, at —, in the [county] aforesaid.
J. S. [L.S.]

Where committed, for trial at the sessions.] By stat. 5 & 6 W. 4, c. 38, s. 3, it shall be lawful for any justice of the peace to commit for safe custody to any house of correction situate near to the place where the sessions are to be holden, at which the prisoner is intended to be tried. Formerly they could be committed only to the county gaol.

Also, justices of boroughs or franchises, not having power to hear and determine felonies, instead of being obliged, as formerly, to commit all felons for trial at the assizes, may now commit them for trial at the quarter sessions for the county, &c., in which such borough or franchise is situate. 4 & 5 W. 4, c. 27, s. 1. And justices of boroughs and franchises, having power to try felonies, may commit the person charged with felony for trial at the quarter sessions of the county, &c., where the offence is within the jurisdiction of the sessions of the county, &c., but not within that of the sessions for the borough or franchise. *Id.* s. 2. But where a felony or misdemeanor is committed within a town or franchise having a recorder, and a prison fit for the confinement of prisoners, the magistrates of such town or franchise shall commit the offender to the prison of such town, in all cases where, if the offence had been committed in the county, it would be tried at the quarter sessions of the county. *Id.* s. 3.

Where committed, for trial at the assizes.] Prisoners in-

tended to be tried at the assizes, may be committed to the common gaol of the county; and formerly they could be committed to no other place. 5 H. 4, c. 10.

But by stat. 5 & 6 W. 4, c. 38, s. 3, justices may commit for safe custody to any house of correction situate near to the place where the assizes are to be holden at which the prisoner is intended to be tried.

And by stat. 14 & 15 Vict. c. 55, s. 20, justices of the peace, at their general or quarter sessions for any county, riding, or division, may, by order made for that purpose, declare that any gaol or house of correction for such county, &c., is a fit prison for persons committed for trial at the assizes for such county, &c., which order shall be transmitted to one of Her Majesty's principal secretaries of state; and after the secretary of state shall approve of such order, any justice of the peace or coroner, acting for such county, &c., may commit for safe custody for trial at the next assizes, to such gaol or house of correction, any person charged with any offence triable at the assizes for such county, &c., and the commitment shall specify that such person is committed under the authority of this Act; and the recognizances to appear to prosecute and give evidence, shall in all such cases be conditioned for appearance, prosecution, and giving evidence at the court of oyer and terminer and gaol delivery for the county.

Committal from county of a town for the assizes.] By stat. 14 & 15 Vict. c. 55, s. 19, whenever any justice or justices of the peace, or coroner, acting for any county of a city or county of a town corporate (within which Her Majesty has not been pleased for five years next before the passing of this act to direct a commission of oyer and terminer and gaol delivery to be executed, and until Her Majesty shall be pleased to direct a commission of oyer and terminer and gaol delivery to be executed within the same,) shall commit for safe custody to the gaol or house of correction of such county of a city or town any person charged with any offence committed within the limits of such county of a city or town not triable at the court of quarter sessions of the said county of a city or county of a town,—the commitment shall specify that such person is committed pursuant to this act; and the recognizances to appear to prosecute and give evidence, taken by such justice, justices, or coroner, shall in all such cases be conditioned for appearance, prosecution, and giving evidence at the court of oyer and terminer and gaol delivery for the next adjoining county. The commitment in such cases will be the same as in ordinary cases, except that after the words "by due course of law," you add, "the said A. B., being hereby committed in pursuance of statute 14 & 15 Vict. c. 55."

And by the same statute, s. 21, the parties so committed

shall afterwards in due time, without writ of *habeas corpus* or other writ for that purpose, be removed by the gaoler or keeper of such gaol or house of correction, with their commitments and detainers, to the common gaol of such county, in order that they may be tried at the assizes to be holden for such county, and such removal shall not be deemed or taken to be an escape.

The like, from towns, &c., not being counties.]—By stat. 60 G. 3, & 1 G. 4, c. 14 s. 1, the justices of the peace in and for any town, liberty, soke, or place, not being a county, but having an exclusive jurisdiction for the trial of felonies and misdemeanors committed within the same, shall have full powers at their discretion, to commit any person, duly charged before them with a capital felony, to the gaol of the county, within which such town &c., shall be situate, there to be tried at the next session of oyer and terminer and gaol delivery there to be holden, in the same manner as if the same had been committed within any other part of the county.

Binding by recognizance; transmission of depositions, &c.] If the accused be committed or bailed, then, by stat. 11 & 12 Vict. c. 42, s. 20, the justice or justices before whom any witness shall be examined as aforesaid, may bind by recognizance the prosecutor and every such witness to appear at the next court of oyer and terminer or gaol delivery, or superior court of a county palatine, or court of general or quarter sessions of the peace, at which the accused is to be tried, then and there to prosecute, or to prosecute and give evidence, or to give evidence, as the case may be, against the party accused, which said recognizance shall particularly specify the profession, art, mystery, or trade of every such persons entering into or acknowledging the same, together with his christian and surname, and the parish, township, or place of his residence, and if his residence be in a city, town, or borough, the recognizance shall also particularly specify the name of the street, and the number (if any) of the house in which he resides, and whether he is owner or tenant thereof, or a lodger therein ;—and the said recognizance, being duly acknowledged by the person so entering into the same, shall be subscribed by the justice or justices before whom the same shall be acknowledged, and a notice thereof, signed by the said justice or justices, shall at the same time be given to the person bound thereby ;—and the several recognizances so taken, together with the written information (if any), the depositions, the statement of the accused, and the recognizances of bail (if any) in every such case, shall be delivered by the said justice or justices, or he or they shall cause the same to be delivered, to the proper officer of the court in which the trial is to be had, before or

at the opening of the said court on the first day of the sitting thereof, or at such other time as the judge, recorder, or justice who is to preside in such court at the said trial shall order and appoint:—Provided always, that if any such witness shall refuse to enter into or acknowledge such recognizance as aforesaid, it shall be lawful for such justice or justices of the peace, by his or their warrant, to commit him to the common gaol or house of correction for the county, riding, division, liberty, city, borough, or place in which the accused party is to be tried, there to be imprisoned and safely kept until after the trial of such accused party, unless in the mean time such witness shall duly enter into such recognizance as aforesaid before some one justice of the peace for the county, riding, division, liberty, city, borough, or place in which such gaol or house of correction shall be situate:—provided nevertheless, that if afterwards, from want of sufficient evidence in that behalf or other cause, the justice or justices before whom such accused party shall have been brought shall not commit him or hold him to bail for the offence with which he is charged, it shall be lawful for such justice or justices, or any other justice or justices of the same county, riding, division, liberty, city, borough, or place, by his or their order in that behalf, to order and direct the keeper of such common gaol or house of correction where such witness shall be so in custody to discharge him from the same, and such keeper shall thereupon forthwith discharge him accordingly.

The following are the forms required by the above section :

Recognizance to Prosecute or give Evidence.

— -: *Be it remembered, that on the — day of —, in the year of our Lord —, C. D. of —, in the township of —, in the said county, [farmer], [or, C. D. of No. 2, — street, in the parish of —, in the borough of —, [surgeon], of which said house he is tenant,] personally came before me, one of Her Majesty's justices of the peace for the said county, and acknowledged himself to owe to our sovereign lady the Queen the sum of £—, of good and lawful money of Great Britain, to be made and levied of his goods and chattels, lands and tenements, to the use of our said lady the Queen, her heirs and successors, if he the said C. D. shall fail in the condition indorsed*

Taken and acknowledged, the day and year first above mentioned, at —, before me, J. S.

Condition to Prosecute.

The condition of the within-written recognizance is such, that whereas one A. B. was this day charged before me, J. S.,

justice of the peace within mentioned, for that [&c., as in the caption of the depositions], if therefore the said C. D. shall appear at the next court of oyer and terminer or general gaol delivery [or at the next court of general quarter sessions of the peace] to be holden in and for the [county] of —, and there prefer or cause to be preferred a bill of indictment for the offence aforesaid against the said A. B., and there also duly prosecute such indictment, then the said recognizance to be void, or else to stand in full force and virtue.*

Condition to Prosecute and give Evidence.

Same as the last form to the asterisk,* and then thus:—
“and there prefer or cause to be preferred a bill of indictment against the said A. B., for the offence aforesaid, and duly prosecute such indictment, and give evidence thereon as well to the jurors who shall then inquire of the said offence, as also to them who shall pass upon the trial of the said A. B., then the said recognizance to be void, or else to stand in full force and virtue.”

Condition to give Evidence,

Same as the last form but one to the asterisk,* and then thus:—“and there give such evidence as he knoweth upon a bill of indictment to be then and there preferred against the said A. B. for the offence aforesaid, as well to the jurors who shall there inquire of the said offence, as also to the jurors who shall pass upon the trial of the said A. B., if the said bill shall be found a true bill, then the said recognizance to be void, or else to stand in full force and virtue.”

Notice of the said Recognizance to be given to the Prosecutor and his Witnesses.

————— } Take notice, that you C. D., of —, are
to wit: } bound in the sum of —, to appear at the
next court of [general quarter sessions of the peace] in and
for the county of —, to be holden at —, in the said
county, and then and there [prosecute and] give evidence
against A. B.; and unless you then appear there, and [pro-
secute and] give evidence accordingly, the recognizance en-
tered into by you will be forthwith levied on you. Dated
this — day of —, 185—.

J. S.

Commitment of Witness for refusing to enter into the Recognizance.

To the constable of — and to the keeper of the [house of correction] at —, in the said [county] of —.

Whereas A. B. was lately charged before the undersigned, [one] of Her Majesty's justices of the peace in and for the said [county] of —, for that [&c., as in the summons to the witness], and it having been made to appear to [me] upon oath, that E. F., of —, was likely to give material evidence for the prosecution, [I] duly issued [my summons to the said E. F., requiring him to be and appear] before [me] on —, at —, or before such other justice or justices of the peace as should then be there, to testify what he should know concerning the said charge so made against the said A. B., as aforesaid; and the said E. F. now appearing before [me], [or being brought before [me] by virtue of a warrant in that behalf, to testify as aforesaid,] hath been now examined by [me] touching the premises, but being by [me] required to enter into a recognizance conditioned to give evidence against the said A. B., hath now refused so to do: these are therefore to command you the said constable to take the said E. F., and him safely to convey to the [house of correction] at —, in the [county] aforesaid, and there deliver him to the said keeper thereof, together with this precept; and I do hereby command you the said keeper of the said [house of correction] to receive the said E. F. into your custody in the said [house of correction,] there to imprison and safely keep him until after the trial of the said A. B. for the offence aforesaid, unless in the meantime such E. F. shall duly enter into such recognizance as aforesaid, in the sum of — pounds, before some one justice of the peace for the said [county], conditioned in the usual form to appear at the next court of [oyer and terminer or general gaol delivery, or general quarter sessions of the peace,] to be holden in and for the [county] of —, and there to give evidence before the grand jury upon any bill of indictment which may then and there be preferred against the said A. B. for the offence aforesaid, and also to give evidence upon the trial of the said A. B., for the said offence, if a true bill should be found against him for the same.

Given under my hand and seal, this — day of —, in the year of our Lord —, at —, in the [county] aforesaid.

Subsequent Order to discharge the Witness.

To the keeper of the [house of correction] at —, in the [county] of —.

Whereas, by [my] order dated the — day of —, [in-

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stant], reciting that *A. B.* was lately before then charged before [me] for a certain offence therein mentioned, and that *E. F.* having appeared before [me], and being examined as a witness for the prosecution in that behalf, refused to enter into a recognizance to give evidence against the said *A. B.*, and [I] therefore thereby committed the said *E. F.* to your custody, and required you safely to keep him until after the trial of the said *A. B.* for the offence aforesaid, unless in the meantime he should enter into such recognizance as aforesaid: and whereas, for want of sufficient evidence against the said *A. B.*, the said *A. B.* has not been committed or holden to bail for the said offence, but on the contrary thereof has been since discharged, and it is therefore not necessary that the said *E. F.* should be detained longer in your custody: these are therefore to order and direct you the said keeper to discharge the said *E. F.* out of your custody as to the said commitment, and suffer him to go at large.

Given under [my] hand and seal, this — day of —, in the year of our Lord —, at —, in the county aforesaid.
J. S. [L.S.]

Copy of depositions for defendant.] At any time after all the examinations have been completed, and before the first day of the assizes or sessions or other first sitting of the court at which a person committed to prison or admitted to bail is to be tried, such person may require and shall be entitled to have, of and from the officer or person having the custody of the same, copies of the depositions on which he shall have been committed or bailed, on payment of a reasonable sum for the same, not exceeding at the rate of three-halfpence for each folio of ninety words.

2. Examination and Commitment where the Arrest is in a different County from that in which the Offence was committed.

Warrant, if evidence prove the charge.] Whenever a person shall appear or shall be brought before a justice of the peace, charged with an offence alleged to have been committed by him in any county or place within *England* or *Wales* wherein such justice shall not have jurisdiction, it shall be lawful for such justice, and he is hereby required, to examine such witnesses, and receive such evidence in proof of such charge as shall be produced before him; and if in his opinion such testimony and evidence shall be sufficient proof of the charge made against such accused party, such justice shall thereupon commit him to the common gaol or house of

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correction for the county, riding, division, liberty, city, borough, or place where the offence is alleged to have been committed, or shall admit him to bail, as herein-after mentioned, and shall bind over the prosecutor (if he have appeared before him or them) and the witnesses by recognizance accordingly, as is herein-before mentioned. 11 & 12 Vict. c. 42, s. 22.

Warrant, if evidence do not prove the charge.] But if such testimony and evidence shall not in the opinion of such justice be sufficient to put the accused party upon his trial for the offence with which he is so charged, then such justice shall bind over such witnesses as he shall have examined, by recognizance, to give evidence, as herein-before is mentioned, and such justice shall, by warrant under his hand and seal, order such accused party to be taken before some justice of the peace in and for the county, riding, division, liberty, city, borough, or place where, and near unto the place where, the offence is alleged to have been committed, and shall at the same time deliver the information and complaint, and also the depositions and recognizances so taken by him to the constable who shall have the execution of such last-mentioned warrant, to be by him delivered to the justice or justices before whom he shall take the accused in obedience to the said warrant; and which said depositions and recognizances shall be deemed to be taken in the case, and shall be treated to all intents and purposes as if they had been taken by or before the said last-mentioned justice, and shall, together with such depositions and recognizances as such last-mentioned justice shall take in the matter of such charge against the said accused party, be transmitted to the clerk of the court where the said accused party is to be tried, in the manner and at the time herein-before mentioned, if such accused party shall be committed for trial upon the said charge, or shall be admitted to bail. 11 & 12 Vict. c. 42, s. 22.

The following is the form of the

Warrant to convey the Accused before the Justice of the County, &c., in which the Offence was committed.

To W. T., constable of —, and to all other peace officers in the said [county] of —.

Whereas A. B., of —, [labourer], hath this day been charged before the undersigned, [one] of Her Majesty's justices of the peace in and for the said county of —, for that [&c. as in the warrant to apprehend]: and whereas [I] have taken the deposition of C. D., a witness examined by [me] in this behalf; but inasmuch as [I] am informed that the principal witnesses to prove the said offence, against the

said A. B., reside in the [county] of C., where the said offence is alleged to have been committed: these are therefore to command you the said constable, in Her Majesty's name, forthwith to take and convey the said A. B. to the said [county] of C., and there carry him before some justice or justices of the peace in and for that [county], and near unto the [parish of D.], where the offence is alleged to have been committed, to answer further to the said charge before him or them, and to be further dealt with according to law: and [I] hereby further command you the said constable to deliver to the said justice or justices the information in this behalf, and also the said deposition of C. D., now given into your possession for that purpose, together with this precept.

Given under my hand and seal, this — day of —, in the year of our Lord —, at —, in the [county] aforesaid.
J. S. [L. S.]

Costs of constable.] In case such accused party shall be taken before the justice last aforesaid by virtue of the said last-mentioned warrant, the constable or other person to whom the said warrant shall have been directed, and who shall have conveyed such accused party before such last-mentioned justice, shall be entitled to be paid his costs and expenses of conveying the said accused party before the said justice; and upon the said constable or other person producing the said accused party before such justice, and delivering him into the custody of such person as the said justice shall direct or name in that behalf, and upon the said constable delivering to the said justice the warrant, information (if any), depositions, and recognizances aforesaid, and proving by oath the handwriting of the justice who shall have subscribed the same, such justice to whom the said accused party is so produced shall thereupon forthwith ascertain the sum which ought to be paid to such constable or other person for conveying such accused party and taking him before such justice, as also his reasonable costs and expenses of returning, and thereupon such justice or justices shall make an order upon the treasurer of the county, riding, division, or liberty, city, borough, or place, or if such city, borough, or place shall be contributory to the county rate of any county, riding, division, or liberty, then upon the treasurer of such county, riding, division, or liberty respectively to which it is contributory, for payment to such constable or other person of the sum so ascertained to be payable to him in that behalf, and the said treasurer, upon such order being produced to him, shall pay the amount to the said constable or other person producing the same, or to any person who shall present the same to him for payment: provided always, that if such last-mentioned justice shall not think the evidence against such accused party sufficient to put him upon his trial,

54 Commitment, where Arrest on a backed Warrant.

and shall discharge him without holding him to bail, every such recognizance so taken by the said first-mentioned justice or justices as aforesaid shall be null and void. 11 & 12 Vict. c. 42, s. 22.

The following is the form of the

Order for Payment of the Constable's Expenses.

To R. W. esquire, treasurer of the county of —.

Whereas W. T., constable of —, in the county of —, hath by virtue of and in obedience to a certain warrant of J. S. esquire, [one] of Her Majesty's justices of the peace in and for the said county of —, taken and conveyed one A. B., charged before the said J. S. with having [&c. stating shortly the offence], from —, in the said county of —, to —, in the said county of —, a distance of — miles, and produced the said A. B. before me S. P., one of Her Majesty's justices of the peace in and for the said county of —, and delivered him into the custody of — by [my] direction, to answer to the said charge, and further to be dealt with according to law; and whereas the said W. T. hath also delivered to [me] the said warrant, together with the information in that behalf, and also the deposition of C. D. in the said warrant mentioned, and hath proved to [me] upon oath the handwriting of the said J. S. subscribed to the same: and whereas [I] have ascertained that the sum which ought to be paid to the said W. T. for conveying the said A. B. from the said county of —, to the said county of —, and taking him before [me], is the sum of —, and that the reasonable expenses of the said W. T. in returning will amount to the further sum of —, making together the sum of —: these are therefore to order you as such treasurer of the said county of —, to pay unto the said W. T. the said sum of —, according to the form of the statute in such case made and provided, for which payment this order shall be your sufficient voucher and authority.

Given under my hand, this — day of —, 185—.

S. P.

How, where the arrest is under a backed warrant.] Where the accused is arrested upon a backed warrant, the constable, if he be not then prepared with any evidence against him, will take him before the justice who first issued the warrant, to be dealt with as above or herein-before is mentioned. But if at the time of the arrest, the prosecutor, or any of the witnesses upon the part of the prosecution, shall then be in the county or place, where such person shall have been apprehended, the

constable or other person who shall have so apprehended such person may, if so directed by the justice backing such warrant, take and convey him before the justice who shall have so backed the said warrant, or before some other justice or justices of the same county or place; and the said justice or justices may thereupon take the examinations of such prosecutor or witnesses, and proceed in every respect in manner above directed with respect to persons charged before a justice or justices of the peace with an offence alleged to have been committed in another county or place than that in which such persons have been apprehended. 11 & 12 Vict. c. 42, s. 11.

3. *Bail.*

In treason.] No justice or justices of the peace shall admit any person to bail for treason, nor shall such person be admitted to bail, except by order of one of Her Majesty's secretaries of state, or by Her Majesty's court of Queen's Bench at Westminster, or a judge thereof in vacation. 11 & 12 Vict. c. 42, s. 28.

In felony and certain misdemeanors.] Where any person shall appear or be brought before a justice of the peace, charged with a felony or with an assault with intent to commit a felony, or with an attempt to commit a felony, or with obtaining or attempting to obtain property by false pretences, or with a misdemeanor in receiving property stolen or obtained by false pretences, or with perjury or subornation of perjury, or with concealing the birth of a child by secret burying or otherwise, or with wilful or indecent exposure of the person, or with riot, or with assault in pursuance of a conspiracy to raise wages, or assault upon a peace officer in the execution of his duty, or upon any person acting in his aid, or with neglect or breach of duty as a peace officer, or with any misdemeanor for the prosecution of which the costs may be allowed out of the county rate, such justice of the peace may, in his discretion, admit such person to bail, upon his procuring and producing such surety or sureties as in the opinion of such justice will be sufficient to ensure the appearance of such accused person at the time and place when and where he is to be tried for such offence; and thereupon such justice shall take the recognizance of the said accused person and his surety or sureties, conditioned for the appearance of such accused person at the time and place of trial, and that he will then surrender and take his trial, and not depart the court without leave. 11 & 12 Vict. c. 42, s. 23.

The following is the form of the

Recognizance of Bail.

Be it remembered, that on the — day of —, in the year of our Lord —, A. B., of —, labourer, L. M., of —, grocer, and N. O. of —, butcher, personally came before [us] the undersigned, two of Her Majesty's justices of the peace for the said [county], and severally acknowledged themselves to owe to our lady the Queen the several sums following; that is to say, the said A. B. the sum of —, and the said L. M. and N. O. the sum of — each, of good and lawful money of Great Britain, to be made and levied of their several goods and chattels, lands and tenements respectively, to the use of our said lady the Queen, her heirs and successors, if he the said A. B. fail in the condition indorsed.

Taken and acknowledged, the day and year first above mentioned, at —, before us.

J. S.

J. N.

Condition.

The condition of the within-written recognizance is such, that whereas the said A. B. was this day charged before [us], the justices within mentioned, for that [&c., as in the warrant]; if therefore the said A. B. will appear at the next court of oyer and terminer and general gaol delivery [or court of general quarter sessions of the peace], to be holden in and for the county of —, and there surrender himself into the custody of the keeper of the [common gaol] there, and plead to such indictment as may be found against him by the grand jury, for or in respect of the charge aforesaid, and take his trial upon the same, and not depart the said court without leave, then the said recognizance to be void, or else to stand in full force and virtue.

Notice of the said Recognizance to be given to the Accused and his Bail.

Take notice, that you A. B. of —, are bound in the sum of —, and your [sureties L. M. and N. O.] in the sum of — each, that you A. B. appear, [&c., as in the condition of the recognizance], and not depart the said court without leave; and unless you the said A. B. personally appear and plead and take your trial accordingly, the recognizance entered into by you and your sureties shall be forthwith levied on you and them.

Dated this — day of —, 185—.

J. S.

How, after commitment.] In all cases where a person charged with any indictable offence shall be committed to prison to take his trial for the same, it shall be lawful, at any time afterwards, and before the first day of the sitting or session at which he is to be tried, or before the day to which such sitting or session may be adjourned, for the justice or justices of the peace who shall have signed the warrant for his commitment, in his or their discretion, to admit such accused person to bail in manner aforesaid;—or if such committing justice or justices shall be of opinion that for any of the offences hereinbefore mentioned the said accused person ought to be admitted to bail, he or they shall in such cases, and in all other cases of misdemeanors, certify on the back of the warrant of commitment his or their consent to such accused party being bailed, stating also the amount of bail which ought to be required, it shall be lawful for any justice of the peace, attending or being at the gaol or prison where such accused party shall be in custody, on production of such certificate, to admit such accused person to bail in manner aforesaid;—or if it shall be inconvenient for the surety or sureties in such a case to attend at such gaol or prison to join with such accused person in the recognizance of bail, then such committing justice or justices may make a duplicate of such certificate as aforesaid, and upon the same being produced to any justice of the peace for the same county, riding, division, liberty, city, borough, or place, it shall be lawful for such last-mentioned justice to take the recognizance of the surety or sureties in conformity with such certificate, and upon such recognizance being transmitted to the keeper of such gaol or prison, and produced, together with the certificate on the warrant of commitment as aforesaid to any justice of the peace attending or being at such gaol or prison, it shall be lawful for such last-mentioned justice thereupon to take the recognizance of such accused party, and to order him to be discharged out of custody as to that commitment, as herein-after mentioned. 11 & 12 Vict. c. 42, s. 23.

And in all cases where such accused person in custody shall be admitted to bail by a justice of the peace other than the committing justice or justices as aforesaid, such justice of the peace so admitting him to bail shall forthwith transmit the recognizance or recognizances of bail to the committing justice or justices, or one of them, to be by him or them transmitted, with the examinations, to the proper officer. 11 & 12 Vict. c. 42, s. 23.

The following is the form of the

Certificate of Consent above mentioned.

I hereby certify, that I consent to the within-named A. B.

being bailed by recognizance, himself in —, and [two] sureties in — each. J. S.

The like, on a separate Paper.

Whereas A. B. was on the —, committed by me to the [house of correction] at —, charged with [&c., naming the offence shortly] :

I hereby certify, that I consent to the said A. B. being bailed by recognizance, himself in —, and [two] sureties in — each. Dated the — day of —, 185—.

J. S.

In other misdemeanors.] Where any person shall be charged before any justice of the peace with any indictable misdemeanor other than those herein-before mentioned, such justice, after taking the examinations in writing as aforesaid, instead of committing him to prison for such offence, shall admit him to bail in manner aforesaid;—or if he have been committed to prison, and shall apply to any one of the visiting justices of such prison, or to any other justice of the peace for the same county, riding, division, liberty, city, borough, or place, before the first day of the sitting or session at which he is to be tried, or before the day to which such sitting or session may be adjourned, to be admitted to bail, such justice shall accordingly admit him to bail in manner aforesaid. 11 & 12 Vict. c. 42, s. 23.

Warrant of deliverance.] In all cases where a justice or justices of the peace shall admit to bail any person who shall then be in any prison charged with the offence for which he shall be so admitted to bail, such justice or justices shall send to or cause to be lodged with the keeper of such prison a warrant of deliverance under his or their hand and seal or hands and seals, requiring the said keeper to discharge the person so admitted to bail, if he be detained for no other offence; and upon such warrant of deliverance being delivered to or lodged with such keeper, he shall forthwith obey the same. 11 & 12 Vict. c. 42, s. 24.

The following is the form of the

Warrant of Deliverance on Bail being given for a Prisoner already committed.

To the keeper of the [house of correction] at —, in the said [county] of —.

Whereas A. B., late of —, [labourer,] hath before [us, two] of Her Majesty's justices of the peace in and for the said county, entered into his own recognizance, and found sufficient sureties for his appearance at the next court of oyer and terminer and general gaol delivery [or court of general

quarter sessions of the peace] to be holden in and for the county of —, to answer our sovereign lady the Queen, for that [&c., as in the commitment], for which he was taken and committed to your said [house of correction]: these are therefore to command you, in Her said Majesty's name, that if the said A. B. do remain in your custody in the said [house of correction] for the said cause, and for no other, you shall forthwith suffer him to go at large.

Given under our hands and seals, this — day of —, in the year of our Lord —, at —, in the [county] aforesaid.

J. S. [L. S.]
J. N. [L. S.]

SECTION IV.

Conviction of Juvenile Offenders for Larceny.

In what cases.] Every person who shall be charged with having committed, or having attempted to commit, or with having been an aider, abettor, counsellor, or procurer in the commission of any offence which now is or hereafter shall or may be by law deemed or declared to be simple larceny, or punishable as simple larceny,—and whose age at the period of the commission or attempted commission of such offence shall not, in the opinion of the justices before whom he or she shall be brought or appear, exceed the age of [sixteen years, 13 & 14 Vict. c. 37, s. 1], shall, upon conviction thereof upon his own confession or upon proof, before any two or more justices of the peace for any county, riding, division, borough, liberty, or place, in petty sessions assembled, at the usual place and in open court, be committed to the common gaol or house of correction within the jurisdiction of such justices, there to be imprisoned, with or without hard labour, for any term not exceeding three calendar months,—or, in the discretion of such justices, shall forfeit and pay such sum not exceeding three pounds, as the said justices shall adjudge, or if a male [not exceeding fourteen years of age, 13 & 14 Vict. c. 37, s. 1], shall be once privately whipped, either instead of or in addition to such imprisonment, or imprisonment and hard labour. 10 & 11 Vict. c. 82, s. 1.

By whom.] Any two or more justices of the peace for any county, riding, division, borough, or place, in petty sessions assembled, and in open court,—or any one magistrate of the police courts of the metropolis,—or any stipendiary magistrate sitting in open court, and having by law the power to do acts usually required to be done by two or more justices of the peace,—have hereby authority to hear and determine the case

according to the provisions of this act; *Id. s. 2*; seemingly, whether the offence be committed within their jurisdiction or not.

Summons or warrant.] Where any person, whose age is alleged not to exceed [sixteen] years, shall be charged with any such offence on the oath of a credible witness, before any justice of the peace, such justice may issue his summons or warrant to summon or apprehend him to appear before two justices, &c., at a time and place to be named therein. *Id. s. 4*. The summons may readily be framed from the form *ante*, p. 32; and the warrant from the form, *ante*, p. 31. Of course this is not necessary, where the party has already been apprehended without warrant, and is in custody; but in that case he must be brought before two or more justices in petty sessions, or before a police or stipendiary magistrate, as above mentioned.

Hearing.] Any justice may issue a summons requiring the attendance of any person as a witness upon the hearing, and it may be served either by delivery of a copy to the witness, or by leaving it with some person for him at his usual place of abode; *Id. ss. 7, 8*; or if he refuse or neglect to attend, the justice may issue his warrant. This summons and warrant may readily be framed from the forms, *ante*, pp. 40, 41.

As soon as the party and witnesses are before the justices, and before the party is asked whether he or she has any cause to show why he or she should not be convicted, one of the justices shall say to him:—“*We shall have to hear what you have to say in answer to the charge against you; but if you wish the charge to be tried by a jury, you must object now to our deciding upon it at once,*”—or words to the like effect. 13 & 14 *Vict. c. 37, s. 2*. If he object, the summary proceeding ceases, and the prosecutor must proceed in the ordinary way, by indictment; but if he say he has no objection, then the justices take his plea, proceed to hear the witnesses, and convict him, or dismiss the charge.

The justices may remand the party for further examination; or they may allow him to go at large, upon his procuring a surety or sureties to be bound by recognizance for his appearance at his further examination. 10 & 11 *Vict. c. 82, s. 5*.

Conviction and commitment.] The conviction may be drawn in the following form, or in any other form to the same effect; and which conviction shall be good and effectual to all intents and purposes. *Id. s. 9*.

The following is the form given in the schedule to the statute:

Conviction.

— } *Be it remembered, that on the — day of —, to wit: } in the year of our Lord one thousand eight hundred and —, at —, in the county of —, [or riding, division, liberty, city, &c., as the case may be], A. O. is convicted before us, J. P. and Q. R., two of Her Majesty's justices of the peace for the said county, [&c.], for that he the said A. O., did [specify the offence, and the time and place when and where the same was committed, as the case may be, but without setting forth the evidence]; and we the said J. P. and Q. R., adjudge the said A. O. for his said offence to be imprisoned in the —, [and there kept to hard labour] for the space of —, [or we adjudge the said A. O., for his said offence, to forfeit and pay — [here state the penalty actually imposed], and in default of immediate payment of the said sum, to be imprisoned in the — [and there kept to hard labour] for the space of —, unless the said sum shall be sooner paid].*

Given under our hands and seals, the day and year first above mentioned.

The justices may order restitution of the property stolen; or if the property be not forthcoming, they may order the offender to pay the value of it to the prosecutor, at once or by instalments. 10 & 11 Vict. c. 82, s. 12.

Also, the justices are empowered to order that the prosecutor be allowed his expenses. *Id.* ss. 15, 16, 17.

The following forms of warrants of commitment, are not given by the schedule to the act:—

Warrant of Commitment on a Conviction where the Punishment is by Imprisonment, &c.

To the constable of —, and to the keeper of the [house of correction] at —, in the said [county] of —.

Whereas A. O. was this day duly convicted before the undersigned, [two] of Her Majesty's justices of the peace in and for the said [county] of —, for that [stating the offence as in the conviction], and it was thereby adjudged that the said A. O. for his said offence should be imprisoned in the [house of correction] at —, in the said county [and there kept to hard labour] for the space of —: these are therefore to command you, the said constable of —, to take the said A. O., and him safely convey to the [house of correction] at — aforesaid, and there to deliver him to the keeper thereof, together with this precept; and I do hereby command you the said keeper of the said [house of correction] to receive the said A. O. into your custody in the said [house

of correction], there to imprison him [and keep him to hard labour] for the space of —; and for your so doing this shall be your sufficient warrant.

Given under my hand and seal, this — day of —, in the year of our Lord —, at —, in the [county] aforesaid.
J. S. [L.S.]

Warrant of Commitment upon a Conviction for a Penalty.

To the constable of —, and to the keeper of the [house of correction] at —, in the said [county] of —.

Whereas A. O. was on this day duly convicted before the undersigned [two] of Her Majesty's justices of the peace in and for the said [county], for that [stating the offence as in the conviction]; and it was thereby adjudged that the said A. O. for his said offence should forfeit and pay the sum of —, [&c., as in the conviction], and in default of immediate payment of the said sum, to be imprisoned in the [house of correction] at — in the said [county] [and there kept to hard labour] for the space of —, unless the said sum should be sooner paid: and whereas the said A. O. hath not paid the said sum or any part thereof, but therein hath made default: these are therefore to command you the said constable of —, to take the said A. O., and him safely to convey to the [house of correction] at — aforesaid, and there to deliver him to the keeper thereof, together with this precept; and I do hereby command you the said keeper of the said [house of correction] to receive the said A. O., into your custody in the said [house of correction], there to imprison him [and keep him to hard labour] for the space of —, unless the said sum shall be sooner paid: and for your so doing this shall be your sufficient warrant.

Given under our hands and seals, this — day of —, in the year of our Lord —, at —, in the [county] aforesaid.

J. P. [L.S.]

Q. R. [L.S.]

This fine, if paid, is to be paid to the clerk of the convicting justices, and by him to the county rate, or rate in the nature of a county rate for the county, city, &c. in which the offence was committed. 10 & 11 Vict. c. 82, s. 6.

Dismissal of the charge.] If the justices, upon the hearing of any such case, shall deem the offence not to be proved, or that it is not expedient to inflict any punishment, they shall dismiss the party charged, on finding surety or sureties for his future good behaviour, or without such sureties, and there make out and deliver to the party a certificate of his dismissal; 10 & 11 Vict. c. 82, s. 1; which certificate shall release the party from all further or other proceedings for the same cause. *Id.* s. 3.

CHAPTER III.

Indictment and Pleadings.

SECTION I.

Indictment.

An indictment is an accusation at the suit of the crown, found to be true by the oaths of a grand jury. 2 Hawk. c. 25, s. 1. It consists of the venue, the commencement, the statement of the offence, and the conclusion; and in this order I shall treat of it under the following heads:—

1. Venue, p. 63.
2. Commencement, p. 75.
3. Body of the Indictment, p. 78.
4. Conclusion, p. 92.
5. Joinder of Offences, p. 93.
6. Joinder of Defendants, p. 96.
7. Indictment, how preferred and found, p. 97.
8. Indictment, in what Cases amendable, p. 99.
9. Indictment, when and how quashed, p. 102.

1. *Venue.*

What.] The venue is the county, &c., stated in the margin of the indictment, and is descriptive of the extent of the jurisdiction of the court before which the offender is to be tried:—in indictments to be tried at the assizes, the venue is the county or county of a city, &c., to which the judges' commission relates; in indictments to be tried at the sessions, the county, riding, division, city, or borough to which the commission of the peace extends. In indictments for offences triable at the central criminal court, the venue is merely "Central Criminal Court, to wit," being descriptive of a certain district, namely, the county of Middlesex, the city of London, and parts of the counties of Essex, Kent, and Surrey, within which the court has jurisdiction.

General rule.] The general rule as to venue, is, that a person who has committed an indictable offence, if tried at the assizes, must be indicted and tried in the county in which the offence was committed; if tried at the sessions, in the county, riding, division, city, or borough within which the

offence was committed, and for which a court of quarter sessions is holden. But to this there are many exceptions, mostly created by statute, which I shall now proceed to notice.

Offences in a county of a city or town corporate.] By stat. 38 G. 3, c. 52, s. 2, the indictment for an offence committed or charged to be committed within the county of any city or town corporate, may be preferred to the jury of the county next adjoining to the county of such city or town corporate, sworn and charged to enquire for the King, for the body of such adjoining county, at any sessions of oyer and terminer or general gaol delivery. The statute (s. 12), however, requires the prosecutor in such a case to enter into a recognizance in 40*l.*, before the court where such bill shall be preferred, conditioned to pay the extra costs of the prosecution, if the court at the trial shall be of opinion that he ought to pay the same. The words "town corporate," in the above act, mean a town corporate which is a county of itself, such as Kingston-upon-Hull, &c. *R. v. Milner*, 2 *Car. & K.* 310. But the statute (s. 11) specially excepts London, Westminster, and the borough of Southwark; and the cities of Bristol, Chester, and Exeter are excepted from it by stat. 5 & 6 W. 4, c. 76, s. 109. But now by stat. 14 & 15 Vict. c. 55, s. 19, all offences committed in any "county of a city or county of a town corporate, within which Her Majesty has not been pleased for five years next before the passing of this act, to direct a commission of oyer and terminer and general gaol delivery to be executed," and which are not triable at the quarter sessions, may be tried in the next adjoining county. And by sect. 24, the next adjoining county shall be the same as is named in sched. C. to stat. 5 & 6 W. 4, c. 76; by which the county of Northumberland is the next adjoining county to Berwick-upon-Tweed, and to Newcastle-upon-Tyne, and Yorkshire the next adjoining county to Kingston-upon-Hull. By the same schedule, Gloucestershire is declared to be the next adjoining county to Bristol, Cheshire to Chester, and Devonshire to Exeter; but at those cities the assizes are holden.

By stat. 14 & 15 Vict. c. 100, s. 23, in such a case, the county of the city or town shall be deemed the venue, and may either be stated in the margin of the indictment, with or without the name of the county in which the offender is to be tried, or be stated in the body of the indictment by way of [special] venue. The usual form of the marginal venue is thus:—*"County of York, (being the next adjoining county to the county of the town of Kingston-upon-Hull,) to wit:"* or as the case may be.

Offences on a journey or voyage, &c.] Where any felony or misdemeanor shall be committed on any person,—or in respect of any property,—in or upon any coach, waggon, cart,

or other carriage whatsoever, employed in any journey,—or shall be committed on any person, or on or in respect of any property, on board any vessel whatever employed on any voyage or journey upon any navigable river, canal, or inland navigation :—such felony or misdemeanor may be dealt with, enquired of, tried, determined, and punished in any county, through any part whereof such coach, waggon, cart, carriage, or vessel shall have passed, in the course of the journey or voyage during which such felony or misdemeanor shall have been committed, in the same manner as if it had been actually committed in such county. 7 G. 4, c. 64, s. 13.

And in all cases where the side, centre, or other part of any highway, or the side, bank, centre, or other part of any such canal, river, or navigation, shall constitute the boundary of any two counties, such felony or misdemeanor may be dealt with, enquired of, tried, determined and punished in either of the said counties, through, adjoining to, or by the boundary of any part whereof such coach, waggon, cart, carriage, or vessel shall have passed, in the course of the journey or voyage during which such felony or misdemeanor shall have been committed, in the same manner as if it had been actually committed in such county. *Id.*

Offences on the boundaries of counties.] Where any felony or misdemeanor shall be committed on the boundary or boundaries of two or more counties,—or within the distance of 500 yards of any such boundary or boundaries,—every such felony or misdemeanor may be dealt with, enquired of, tried, determined, and punished, in any of the said counties, in the same manner as if it had been actually committed therein. 7 G. 4, c. 64, s. 12. This has been holden not to extend to trials in limited jurisdictions, but to be confined to trials in counties only ; and where a man was tried for a larceny at the sessions of the borough of Southwark, it appearing that the offence was in fact committed in the city of London, about twenty yards within the boundary between it and the borough ; and being afterwards indicted for the same larceny in London, he pleaded *auterfois acquit* : the judges held the plea to be bad, as the sessions had no jurisdiction to try the offence, this section of the statute extending only to trials in counties, and not to trials in limited jurisdictions. *R. v. Welsh, Ry. & M.* 175.

Offences begun in one county and completed in another.] Where any felony or misdemeanor shall be begun in one county and completed in another, it may be dealt with, enquired of, heard, determined, and punished in either county, as if it were wholly committed therein. 7 G. 4, c. 4, s. 12. See *R. v. Welsh, supra*.

Offences partly in England, partly out.] Where any person, being previously stricken, poisoned, or otherwise hurt

upon the sea, or at any place out of England, shall die of such stroke, poisoning, or hurt in England,—or being feloniously stricken, poisoned, or otherwise hurt at any place in England, shall die of such stroke, poisoning, or hurt upon the sea, or at any place out of England,—every offence committed in respect of any such case, whether the same amount to the offence of murder or manslaughter, or of being accessory before the fact to murder, or after the fact to murder or manslaughter,—may be dealt with, enquired of, tried, determined, and punished, in the county or place in England in which such death, stroke, poisoning, or hurt shall happen, in the same manner as if the offence had been wholly committed in that county or place. 9 G. 4, c. 31, s. 8.

Offences abroad.] By stat. 9 G. 4, c. 31, s. 7, if any of His Majesty's subjects shall be charged in England with any murder or manslaughter, or with being accessory before the fact to any murder, or after the fact to any murder or manslaughter, the same being respectively committed on land out of the United Kingdom, whether within the King's dominions or without,—a commission of oyer and terminer under the great seal shall be directed to such persons, and into such county or place, as shall be appointed by the Lord Chancellor, for the speedy trial of such offender; peers however are in such cases to be tried by their peers. The venue in the margin of the indictment, in such a case, should be the county in which the special commissioners are directed by their commission to sit. Where the indictment stated the offence to have been committed at Boulogne, in the kingdom of France, to wit, at London, &c., and the grand jury objected to it, as stating the death to have happened at two places,—Bayley, J. ordered the words "at London," &c., to be struck out. *R. v. Helsham*, 4 Car. & P. 394. The admission of the prisoner that he is a British subject, is good evidence that he is so. *Id.* See *R. v. Matts*, 7 Car. & P. 458; *R. v. Depardo*, R. & Ry. 134; *R. v. Sawyer*, 2 Car. & K. 101; and see stat. 11 & 12 Vict. c. 42, s. 2; and ante, p. 35.

Also, for misdemeanors committed abroad, by persons holding public offices or employments under the British government, the offenders may in like manner be tried, &c., in this country. 42 G. 3, c. 85. See *R. v. Shawe*, 5 M. & S. 403.

Offences at sea.] The venue in indictments for offences committed at sea, within the jurisdiction of the Admiralty, varies according to the court in which the offender is prosecuted:—if proceeded against before a special commission, which was the only mode of prosecution formerly, the venue in the margin is merely "Admiralty of England;" if at the central criminal court, "Central Criminal Court, to wit;" if

at the assizes, the county in which the assizes are holden. Besides thus noticing the venue, it may be convenient in this place to make a short statement as to the extent of the Admiralty jurisdiction, and the offences of which the admiral is said to have cognizance.

The admiral has exclusive jurisdiction of all offences committed on the high seas, and within the harbours, creeks, and havens of foreign countries. But within the harbours, creeks, and havens of this country, the courts of common law, and not the admiral, have jurisdiction: as for instance, if an imaginary line were drawn across the mouth of such creek, &c., from one point of land to the other,—of all offences committed within the line, the common law would have jurisdiction; but all offences committed without the line, would be within the jurisdiction of the admiral. As to the sea shore:—below low water mark, the admiral has exclusive jurisdiction; above high water mark, the courts of common law have exclusive jurisdiction; and between high and low water mark, the courts of common law and the admiral have alternate jurisdiction,—the courts of common law have jurisdiction of all offences committed on the strand when the tide is out,—the admiral, jurisdiction of all offences committed on the water, when the tide is in. Formerly, if a man on land fired a pistol or gun at a man who was upon the sea, and killed him, the offence was deemed to be within the Admiralty jurisdiction; for the offence was holden to be committed where the death happened, and not at the place from whence the cause of death proceeded. *R. v. Combes*, 1 *East*, *P. C.* 367. But now, in such a case we have seen, (*ante*, p. 65, 66,) he may be tried in the same manner as if the whole of the offence was committed on land. 9 *G. 4*, c. 31, s. 8. Also, all offences committed on the high seas against any Act relating to the customs, shall, for the purposes of prosecution, be deemed to have been committed on the place on land in the United Kingdom into which the offender shall be taken, brought, or carried, or in which he shall be found. 3 & 4 *W. 4*, c. 53, s. 77. 8 & 9 *Vict. c.* 87, s. 95.

Besides the offence of piracy, and some other offences which can only be committed at sea, the admiral has jurisdiction of all treasons, felonies, conspiracies; 28 *H. 8*, c. 15; murder; *Id.* 1 *East*, *P. C.* 367. See *R. v. Serva et al.*, 2 *Car. & K.* 53; attempts to murder or maim or do grievous bodily harm, within stat. 1 *Vict. c.* 85, by sect. 10; all other offences against the person, within stat. 9 *G. 4*, c. 31, by sect. 32; doing injury by explosive substances, within stat. 8 & 9 *Vict. c.* 25, by sect. 17; offences punishable by the statute against forgery, 1 *W. 4*, c. 66, by sect. 27; all offences relating to the coin, within stat. 2 *W. 4*, c. 34, by sect. 20; and generally, all other offences committed on the high seas, out of the body of any county. 39 *G. 3*, c. 37. And all offences committed

at sea are now punishable in the same manner as if committed on land. 7 & 8 G. 4, c. 28, s. 12.

By stat. 28 H. 8, c. 15, all treasons, felonies, robberies, murders, and conspiracies committed on the seas, or in any haven where the admiral has jurisdiction, were triable, according to the course of the common law, in such places as were appointed by commission. But that mode of proceeding being found productive of delay, jurisdiction was given to the central criminal court of all offences "committed or alleged to have been committed on the high seas, and other places within the jurisdiction of the Admiralty of England." 4 & 5 W. 4, c. 36, s. 22. *And see R. v. Wallace*, 1 Car. & M. 200. And now, by stat. 7 & 8 Vict. c. 2, s. 1, authority is given to Her Majesty's judges of assize and commissioners of oyer and terminer, to inquire of, hear, and determine all offences alleged to have been committed on the high seas and other places within the jurisdiction of the Admiralty of England; and, by sect. 2, in all indictments preferred before them, the venue laid in the margin shall be the same as if the offence were committed in the county where the trial is to be had, but the material facts shall be averred to have taken place "on the high seas." It is not necessary to allege that it was committed within the jurisdiction of the Admiralty. *R. v. Jones et al.*, 2 Car. & K. 165. 1 Den. C. C. 101. And the accessory before or after the fact, may be tried by the same court which has jurisdiction to try the principal felon. *Ante*, pp. 15, 18.

Murder and manslaughter.] Where the death and cause of death both happen in the same county, &c., the venue of course must be laid there. Where the cause of death happens in one county and the death in another, the venue may be laid in either. *See stat.* 7 G. 4, c. 64, s. 12, *ante*, p. 65. And where the cause of death happens in England, and the death on the high seas, or at any place out of England,—or if the cause of death happen on the high seas or at any place out of England, and the death in England,—the party, whether charged with murder or manslaughter, or as accessory before the fact to murder, or after the fact to murder or manslaughter, may be tried in the county or place in England where the cause of death or death happened, in the same manner as if the offence had been wholly committed in that county or place. 9 G. 4, c. 31, s. 8. *Ante*, pp. 65, 66.

Libel.] In an indictment for publishing a libel, the venue must be laid in the county, &c., where it was published. But if the publication were by sending it from the defendant to the prosecutor, unsealed, &c., the venue may be laid either in the county from which it was sent, or in that in which it

was received. And the same, if it were sent sealed, and the indictment was for writing or printing and publishing it. See *R. v. Burdett*, 4 B. & Ald. 95.

Larceny.] The venue in larceny, as in other cases, may be laid in the county in which the goods were stolen. But at common law, if a man steal goods in one county, and carry them into another, he may be indicted and tried in either; 2 Hawk. c. 25, s. 38; for he is deemed guilty, as well of a taking as of a carrying away, in both. The larceny, however, must be one at common law, and not a larceny created by statute. *R. v. Millar*, 7 Car. & P. 665. And now, by stat. 7 & 8 G. 4, c. 29, s. 76, if any person, having stolen or otherwise feloniously taken any chattel, money, or valuable security, or other property whatsoever, in any one part of the United Kingdom, shall afterwards have the same property in his possession in any other part of the United Kingdom, he may be dealt with, tried, and punished for larceny or theft in that part of the United Kingdom where he shall have such property, in the same manner as if he had actually stolen or taken it in that part. Jersey, however, is not a part of the United Kingdom, for this purpose; and therefore where it appeared that the prisoner stole the goods in Jersey, and they were found in his possession at Weymouth in Dorsetshire, the judges held that he could not be indicted for it in Dorsetshire, within the meaning of this Act. *R. v. Proves*, Ry. & M. 349. And see *R. v. Madge*, 9 Car. & P. 29. So, where a man stole a brass furnace in Radnorshire, broke it to pieces there, and then brought the pieces of brass into the county of Hereford: Hullock, B., held that he could not be indicted in Hereford for stealing the furnace there, it never having in fact been in Hereford. *R. v. Halloway*, 1 Car. & P. 127. But no distance of time, between the stealing in one county and having the property in another, will prevent the party from being indicted in the latter county; and therefore where the property was stolen by the prisoner in Yorkshire in November, 1823, and brought by him into Durham in March, 1824, the judges held that he might be indicted for the larceny in Durham. *R. v. Parkin*, Ry. & M. 45. But where the prisoners stole two horses at different times and at different places in Somersetshire, and brought both at the same time into Wilts, and had them there in their possession: Littledale, J., held that this did not warrant the including both larcenies in one indictment; and he therefore put the prosecutor to his election as to which offence he would prosecute. *R. v. Smith and Jefferies*, Ry. & Mo. N. P. C. 295.

Embezzlement.] The venue must be laid in the county, &c., in which the embezzlement took place, if that be known.

But in the absence of express evidence upon that subject, the venue may be laid, either in the county where the defendant received the money, &c., or (and perhaps more properly) in the county in which he ought to have accounted for it to his master, and did not. Where the master resided in Staffordshire, and the prisoner by his orders received money for him in the county of Salop, and, being afterwards asked by his master in Staffordshire whether he had received it, said he had not; and there was no evidence in which of the two counties the embezzlement actually took place! being indicted for this offence in the county of Salop, ten of the judges held it to be correct. *R. v. Hobson*, 1 *East*, P. C. xxiv., *R. & Ry.* 56. On the other hand, where a master, residing in Middlesex, sent his servant to a customer in Surrey with goods, for which he was to be paid, and he received payment from the customer accordingly; and being asked by his master, on his return, if he had received payment, answered that he had not: being indicted for the offence in Middlesex, and it being objected that he should have been indicted in Surrey where he received the money, the judges held that he was properly indicted in Middlesex; that the denial of the receipt of the money, when the prisoner was called upon by his master to account for it, was the first act from which the jury could with certainty say that the prisoner intended to embezzle it; and that even if it were proved that he had spent the money in Surrey, that would not necessarily have confined the trial of the offence to that county. *R. v. Taylor*, *R. & Ry.* 63.

False pretences.] The obtaining of the money by the false pretence, is in this case the offence, and the venue must therefore be laid in the county, &c., where the money was obtained. A difficulty sometimes arises in this respect, where the false pretence is made by letter. Where the prisoner gave the letter containing the false pretence, to an accomplice in Middlesex, desiring him to put it into the post-office at Gravesend; it was dated as from Gravesend, and directed to the prosecutor at Bath, requesting him to send him a post-office order by post, directed to James Power, Gravesend; the letter arrived at Bath, but the prosecutor being then in Middlesex, it was forwarded to him there, and he accordingly sent the post-office order from Middlesex to Gravesend: the prisoner being indicted in Middlesex, for obtaining this post-office order by false pretences, it was objected that the offence ought to be tried in Kent, where the order and the money for it was received; but the judges held that by desiring the order to be sent by post, the prisoner constituted the postmaster his agent for receiving it, and the postmaster having received it in Middlesex, the prisoner was properly indicted there. *R. v. Jones*, 19 *Law J.* 162 *m.*

Stealing from wreck, &c.] For stealing from a ship in distress, wrecked, stranded, or cast on shore, the offender may be indicted and tried, either in the county, &c., in which the offence was committed, or in any county next adjoining. 7 & 8 G. 4, c. 29, s. 18.

So, any person committing an offence against stat. 9 & 10 Vict. c. 99, intituled "An Act for consolidating and amending the laws relating to wreck and salvage," by which persons cutting away or defacing buoys or buoy ropes—or purchasing anchors, cables, or goods weighed up, swept for, &c.,—are punishable,—may be laid to be committed and may be tried in any city, county, or place where any such article, matter, or thing in relation to which such offence shall be committed, shall have been found in the possession of the person committing the offence, or where the offender may at any time happen to be. 9 & 10 Vict. c. 99, s. 38.

Receivers.] A person charged with receiving goods feloniously stolen, or obtained by false pretences, knowing the same to have been so stolen or obtained, may be indicted and tried, either in any county or place where he shall have or shall have had the property in his possession, or in any county or place where the principal offender may be tried, in the same manner as he may be indicted and tried in the county or place where he received the property. 7 & 8 G. 4, c. 29, s. 56.

Forgery.] By stat. 11 G. 4 & 1 W. 4 c. 66 (the Forgery Act), s. 24, if any person shall commit any offence against that Act, or shall commit any offence of forging or altering any matter whatsoever, or of offering, uttering, disposing of, or putting off any matter whatsoever, knowing the same to be forged or altered, whether the same shall be indictable at common law or by virtue of any statute made or to be made: the offence of every such offender may be dealt with, tried, and punished, and laid and charged to have been committed, in any county or place in which he shall be apprehended or be in custody, as if his offence had been actually committed in that county or place; and every accessory before or after the fact, if the same be a felony, and every person aiding, abetting, or counselling the commission of such offence, if the same be a misdemeanor, may be dealt with, indicted, tried, and punished, and his offence laid and charged to have been committed in any county or place in which the principal may be tried. Where the jury found that the prisoner was guilty of the forgery with which he was charged, but that there was no evidence of his having committed it within the jurisdiction of the court: the judge held that the defendant being before the court at his trial, was there "in custody" within the meaning of the above section, and that it was therefore unnecessary to allege or

prove when or where he was taken into custody. *R. v. Smythies*, 19 *Law J.* 31, *m.*; and see *R. v. Whiley*, 1 *Car. & K.* 150.

Treason or conspiracy.] The venue in treason committed in England, may be laid in any county in which a good overt act can be proved. Treason out of the realm, may be tried either before the court of Queen's Bench, by a jury of the county where the court sits,—or by commission, in any county therein named, by a jury of such county. 35 *H.* 8, *c.* 2; see 2 *Hawk. c.* 25, *ss.* 48-53.

So the venue in conspiracy may be laid in any county where a good overt act can be proved. *R. v. Brisac & Scott*, 4 *East*, 171.

Unlawful oaths.] In an indictment for administering an oath to commit treason or murder, the venue may be laid, and the offender tried before a court of oyer and terminer, in any county in England, as if the offence were committed there. 52 *G.* 3, *c.* 104, *s.* 8.

Foreign service.] The offence of engaging in foreign military or naval service, without licence from the crown, or going abroad for that purpose, or engaging others in such service,—if committed in England, may be tried before the court of Queen's Bench, and the venue laid at Westminster; or at the assizes or sessions for the county where the offence was committed, and the venue laid there; 59 *G.* 3, *c.* 69, *s.* 4; or if committed out of the United Kingdom, the offender may be prosecuted in the court of Queen's Bench, Westminster, and the venue laid at Westminster, in the county of Middlesex. *Id.* *s.* 9.

Inciting to mutiny.] The offence of endeavouring to seduce any person serving in Her Majesty's forces by sea or land, from their duty and allegiance, or inciting them to mutiny, which is made felony by stat. 37 *G.* 3, *c.* 70, *s.* 1, may, whether committed on the high seas or in England, be prosecuted and tried before any court of oyer and terminer or gaol delivery for any county in England, as if the offence had been committed there. 37 *G.* 3, *c.* 70, *s.* 2.

Smuggling.] In an indictment for smuggling, or for any offence against stat. 8 & 9 *Vict.* *c.* 87, or any other Act relating to the customs, if the offence have been committed in England, the venue may be laid and the offender tried in any county, in such manner and form as if the offence was committed in that county. 8 & 9 *Vict.* *c.* 87, *s.* 136. And where any offence shall be committed on the high seas against that Act or any

other Act relating to the customs, such offence shall, for the purpose of prosecution, be deemed and taken to have been committed at the place on land in the United Kingdom, into which the offender shall be taken, brought or carried, or in which such person shall be found. *Id.* s. 95.

Post office.] The offence of every offender against the post-office Acts, may be dealt with, indicted, tried, and punished, and laid and charged to have been committed, either in the county or place where the offence shall be committed, or in any county or place in which the offender shall be apprehended or be in custody; and where an offence shall be committed in or upon or in respect of a mail, or upon a person engaged in the conveyance or delivery of a post letter bag or post letter, or in respect of a post letter bag or post letter, or a chattel or money or valuable security sent by the post, such offence may be dealt with and inquired of, and tried and punished, and laid and charged to have been committed, as well in any county or place in which the offender shall be apprehended or be in custody, as also in any county or place through any part whereof the mail or the person, or the post letter bag or post letter, or the chattel, money or valuable security sent by post, in respect of which the offence shall be committed, shall have been passed in due course of conveyance or delivery by the post, in the same manner as if it had been actually committed in such county or place. 1 *Vict. c. 36, s. 37.*

Counterfeit coin.] In all offences against stat. 2 W. 4, c. 34, relating to the coin, the venue in ordinary cases is laid in the county, &c., in which the offence was committed. But where two or more persons, acting in concert in different counties or jurisdictions, shall commit any offence against that Act, all or any of the said offenders may be dealt with, indicted, tried and punished, and their offence laid and charged to have been committed, in any one of the said counties or jurisdictions, as if the offence had been actually and wholly committed within such one county or jurisdiction: provided that crimes and offences against that Act, committed in Scotland, shall be tried in Scotland as hitherto. 2 W. 4, c. 34, s. 15.

Escape and rescue from prison.] Any person escaping from a gaol or house of correction, or breaking prison or being rescued therefrom, may be tried either in the jurisdiction where the offence was committed, or in that where he shall be apprehended and retaken. 9 G. 4, c. 64, s. 44.

Returning from transportation.] In prosecutions for returning from transportation before the expiration of the sentence, the offender may be tried either in the county or place

where he shall be apprehended, or in that from whence he was ordered to be transported. 5 G. 4, c. 84, s. 22.

Sending a challenge to fight.] Where a challenge to fight is sent by letter in one county, and received in another, even if sent by post, the venue in an indictment for the offence, may be laid in the county from which the letter was sent, *R. v. Williams*, 2 Camp. 506, or in the county in which it was received.

Threatening letter.] In an indictment for sending a threatening letter, the venue may be laid in the county where the letter was received, *Girdwood's case*, 1 Leach, 142, 2 East, P. C. 1120. *Essex's case*, 2 East, P. C. 1125, 2 Russ. 723, or in the county from which it was sent.

Bigamy.] In prosecutions for bigamy, the venue may be laid, and the offence may be dealt with, inquired of, tried, determined, and punished, in the county where the offender shall be apprehended or be in custody, as if the offence had been actually committed in that county; 9 G. 4, c. 31, s. 22. See *R. v. Whiley*, 1 Car. & K. 150, and see *R. v. Smythies*, 19 Law J. 31 m. ante, pp. 71, 72; or it may be laid in the county, where the second marriage took place. 2 Hawk. c. 25, s. 30.

For an offence of omission.] Where the offence consists of omitting to do an act which the law enjoins or commands to be done, the venue should be laid in that county in which the act ought to have been done. And therefore in an indictment against a bankrupt for not surrendering, the venue must be laid in the county in which the Bankruptcy Court is situate, at which he ought to have surrendered. *R. v. Milner*, 2 Car. & K. 310. In an indictment for not repairing a highway or bridge, the venue must be laid in the county, &c., in which the part of the highway or bridge which is out of repair is situate.

Accessories before the fact.] By stat. 7 G. 4, c. 64, s. 9, the offence of accessory before the fact, howsoever indicted, may be inquired of, tried, determined, and punished, by any court which shall have jurisdiction to try the principal felon, in the same manner as if such offence had been committed at the same place as the principal felony, although such offence may have been committed on the high seas or at any place on land, whether within His Majesty's dominions, or without; and in case the principal felony shall have been committed within the body of any county, and the offence of accessory within the body of any other county, the accessory may be tried and punished in either county. See ante, p. 15.

Accessories after the fact.] By stat. 11 & 12 Vict. c. 46, s. 2, the offence of accessory after the fact, howsoever indicted, may be inquired of, tried, determined, and punished, by any court which shall have jurisdiction to try the principal felon, in the same manner as if the act by reason of which such person shall have become an accessory, had been committed at the same place as the principal felony. *See ante*, p. 18.

Central criminal court.] The central criminal court has jurisdiction of all indictable offences committed within the city of London, the county of Middlesex, and within certain limits in the counties of Essex, Kent, and Surrey. 4 & 5 W. 4, c. 36, s. 2.*

The court has jurisdiction to try all offences committed or alleged to be committed on the high seas, and other places within the jurisdiction of the Admiralty of England. *Id.* s. 22.

The venue in the margin of the indictments in this court, is in all cases "Central Criminal Court, to wit;" and the facts in the body of the indictment are stated to have taken place "within the jurisdiction of the said court." *Id.* s. 3, *see also* stat. 9 & 10 Vict. c. 24.

Defective venue, cured.] By stat. 7 G. 4, c. 64, s. 20, it was enacted that judgment, whether after verdict, outlawry, confession, default, or otherwise, should not be stayed or reversed, for want of a proper or perfect venue, where the court shall appear by the indictment or information to have had jurisdiction over the offence. But now, by stat. 14 & 15 Vict. c. 100, s. 24, no indictment for any offence shall be holden insufficient, "for want of a proper or perfect venue." Still, however, if it appear in evidence that the prisoner is on his trial in a wrong jurisdiction, and that the court has not cognizance of the offence, he must be acquitted. *See 2 Hawk.* c. 25, s. 35.

* These limits are thus described by sect. 2:

City of London.

County of Middlesex.

In the county of Essex:—the parishes of Barking, East Ham, West Ham, Little Ilford, Low Layton, Walthamstow, Wanstead, St. Mary, Woodford, and Chingford;

In the county of Kent:—Charlton, Lee, Lewisham, Greenwich, Woolwich, Eltham, Plumstead, St. Nicholas Deptford, that part of St. Paul Deptford which is in the county of Kent, the liberty of Kid-

brook, and the hamlet of Mottingham.

In the county of Surrey:—the borough of Southwark, the parishes of Battersea, Bermondsey, Camberwell, Christchurch, Clapham, Lambeth, St. Mary Newington, Rotherhithe, Streatham, Barnes, Putney, that part of St. Paul Deptford which is within the county of Surrey, Tooting, Graveney, Wandsworth, Merton, Mortlake, Kew, Richmond, Wimbledon, the Clink liberty, and the district of Lambeth Palace.

2. *Commencement of the Indictment.*

The following is the form of the

Commencement of an Indictment.

*Yorkshire, } The jurors for our Lady the Queen upon
to wit. } their oath present, that* [&c., stating the matter of the indictment.] A second or subsequent count begins thus: "*And the jurors aforesaid upon their oath aforesaid do further present, that*" &c.

Where the indictment commenced "The jurors of our Lady the Queen," it was holden that it was not bad on that account, as the caption would cure it. *Broom v. Regina*, 12 *Shaw's J. P.* 628.

At the assizes, the venue in the margin is the county, or the county of the city or the county of the town corporate, in and for which the assizes are holden. At the quarter sessions, the venue is regulated by the commission of the peace under which the court derive their jurisdiction: for instance, at the sessions for the East Riding of the county of York, the venue is "East Riding of the county of York," and so of the other ridings, and of the divisions of Lincolnshire, each having a separate commission of the peace; and at the sessions for Hull, the venue is "Borough of Kingston-upon-Hull," and so of other boroughs, having separate commissions of the peace, and separate courts of quarter sessions.

The caption of an indictment is the heading of the record, when the record is made up, and is the same to every indictment found at the same assizes or sessions. It shows, and it must show correctly and with certainty, the court before which the indictment was found, the grand jurors by whom it was found, and the time and place when and where found. 2 *Hawk. c.* 25, *s.* 118. It must appear from it that the indictment was found before a court that had jurisdiction of the offence; *Id. s.* 119—123; it must appear from it, that the jurors who found it were of the county, &c., for which the court was holden, that they were at least twelve in number, and that they found the indictment upon their oaths; *Id. s.* 126; it must show the day and year on which the court was holden, and must state the indictment to be then found, in the present tense; *Id. s.* 127; and it must state the place where the indictment is found, and show that it is within the county, &c., in which the court has jurisdiction. *Id. s.* 128.

The following is the form of a

Caption of an Indictment at the Assizes.

*Warwickshire, } Be it remembered that at the general
to wit: } sessions of the Lady the Queen of oyer
and terminer, holden at Warwick in and for the said county
of Warwick, on Friday the — day of —, in the — year*

of the reign of the Lady Victoria now Queen of the United Kingdom of Great Britain and Ireland, before Sir —, knight, one of the justices of our said Lady the Queen, assigned to hold pleas before the Queen herself, Sir —, knight, one of the justices of our said Lady the Queen of her court of Common Bench, and others their fellows, justices of the said Lady the Queen, assigned by letters patent of our said Lady the Queen under her great seal of the United Kingdom, made to them the aforesaid justices and others, and any two or more of them (whereof one of them the said Sir —, and Sir —, the said Lady the Queen would have to be one), to inquire (by the oath of good and lawful men of the county aforesaid, by whom the truth of the matter might be better known, and by other ways, methods, and means whereby they could or might the better know, as well within liberties as without) more fully the truth of all treasons, misprisions of treasons, insurrections, rebellions, counterfeitings, clippings, washings, false coinings, and other falsities of the monies of the United Kingdom, and of other kingdoms and dominions whatsoever; and of all murders, felonies, manslaughterers, killings, burglaries, rapes of women, unlawful meetings and conventicles, unlawful uttering of words, unlawful assemblies, misprisions, confederacies, false allegations, trespasses, riots, routs, retentions, escapes, contempts, falsities, negligences, concealments, maintenances, oppressions, champerties, deceits, and all other misdeeds, offences, and injuries whatsoever, and also the accessories of the same, within the county aforesaid, as well within liberties as without, by whomsoever or howsoever done, had, perpetrated and committed, and by whom, to whom, when, how, and in what manner; and of all other articles and circumstances in the said letters patent of the said Lady the Queen specified, the premises and every or any of them howsoever concerning; and for this time to hear and determine the said treasons and other the premises according to the law and custom of the realm of England; and also keepers of the peace, and justices of the said Lady the Queen assigned to hear and determine divers felonies, trespasses, and other misdemeanors committed within the county aforesaid, —by the oath of A. B. [&c., naming the grand jurors] esquires, good and lawful men of the county aforesaid, then and there impanelled, sworn, and charged to inquire, for the said Lady the Queen, and for the body of the said county, it is presented that [&c., setting out the indictment, to the end.] 4 Bl. Com. Ap. i.

Caption of Indictment at the Sessions.

East Riding of the } At the general quarter sessions of
county of York, to wit: } the peace, holden at the town of

Beverley, in and for the said riding, on Tuesday the — day of —, in the — year of the reign of our sovereign Lady Victoria, by the grace of God of the United Kingdom of Great Britain and Ireland, Queen, defender of the faith, before A. B. and C. D., esquires, and others their associates, justices of our said Lady the Queen, assigned to keep the peace in the said riding, and also to hear and determine divers felonies, trespasses, and other misdemeanors in the said riding committed,—by the oath of twelve good and lawful men of the riding aforesaid, sworn and charged to inquire for our said Lady the Queen, and for the body of the riding aforesaid, it is presented that [&c., setting out the indictment to the end.]

Although in the first of the above forms the names of the grand jurors are set out, according to the precedent from which it is taken, yet it has been holden, on error to the House of Lords, that this is not necessary. *Aylett v. Rex, in error, 3 Bro. Parl. Ca. 529.* I have accordingly omitted the names in the second of the above forms.

3. *Body of the Indictment.*

Defendant how named.] The person charged by the indictment must be described by his christian or first name, and his surname. Formerly also, his addition of place or late residence, and his addition of degree or mystery, must have been given; as—“late of the parish of —, in the county of —, labourer,” or the like; and if it were omitted, or a wrong addition given to him, he might plead the matter in abatement. But now, by stat. 14 & 15 Vict. c. 100, s. 24, no indictment for any offence shall be holden insufficient “for want of, or imperfection in, the addition of any defendant;” and such addition may therefore be safely omitted altogether. And whether the names, or the addition (if any) given to the defendant in the indictment, be a correct description of him or not, is now immaterial; for by stat. 7 G. 4, c. 64, s. 19, no indictment or information shall be abated by any dilatory plea of misnomer or of want of addition or of wrong addition of the party offering such plea; but the court, if satisfied of the truth of the plea by affidavit or otherwise, shall forthwith cause the indictment or information to be amended, and shall call upon the party to plead thereto, and shall proceed as if no such dilatory plea had been pleaded. It may be necessary here to observe, that a name of dignity, as Baron, Baronet, Garter King at Arms, (2 Hawk. c. 25, s. 69,) or the like, is not an addition, but as much a part of the name of the defendant as his christian or surname. But if it be omitted, or erroneously stated, this is the subject of amendment, within the meaning of the section last mentioned.

When however it is necessary to describe the defendant in any particular way, to bring him within the purview of any statute on which the indictment is framed, such statute extending only to such persons as are named in it,—the indictment must so describe the party, as to bring him within the words and meaning of the statute, and the evidence must support the description. 2 *Hawk. c. 25, s. 112.*

In indictments against a parish or township for the non-repair of a highway, 2 *Hawk. c. 25, s. 68*, or the inhabitants of a county for not repairing a bridge, the indictment may be against the inhabitants of the parish, township, or county generally, without naming any individual.

An indictment against a corporation, must charge them by their corporate names; *see ante* p. 8, 9; and if there be any mistake in doing so, it may be remedied by amendment as above-mentioned.

Prosecutor or party injured, how named.] The prosecutor or party injured, or any other person named in the indictment, if known, must be described with certainty; 2 *Hawk. c. 25, s. 71*: if an individual, he must be described by his christian and surname; if a corporation, by their name of incorporation. But it is not necessary to give any addition of degree or mystery; 2 *Hale*, 182, and *see R. v. Peace*, 3 *B. & Ald.* 579; nor is it safe to do so; for where in bigamy, the second wife was described as Elizabeth Chant, widow, and it appeared in evidence that she was at the time, in fact and by reputation, a single woman, the judges held the misdescription to be fatal, although it was not necessary to have stated more than the name of the party. *R. v. Deeley*, *R. & Ry.* 303, 4 *Car. & P.* 579. But if the party be described by the name by which he is usually known, it will be sufficient; and therefore where the prosecutor was named in the indictment "John Hancox," his real name being John Walter Hancox, but he was usually called and known by the name of John Hancox, Parke, J. held it to be sufficient. *R. v. Berriman*, 5 *Car. & P.* 601. So, where the real name was Richard Jeremiah Pratt, but he was named in the indictment Richard Pratt, the name by which he was generally known, it was holden sufficient. *Anon.* 6 *Car. & P.* 408. So, where the prosecutrix was named in the indictment by a name which she had assumed, but by which alone she was known in the neighbourhood, the judges held it sufficient. *R. v. Norton*, *R. & Ry.* 510. So where the prosecutor was named Charles Frederick Augustus William, duke of Brunswick, that being the name by which he was generally known, though his proper family name was D'Este: the court held that as the law in this case only required certainty to a common intent, the description was sufficient. *R. v. Gregory*, 10 *Shaw's J. P.* 262. So, if a bastard acquire a name by reputation, he may be described by it in the indictment. And

when a child was baptized by the name of Louis, and his mother's maiden name was Drake, the only name by which she was known, and the nurse to whom he was sent, spoke of him to several persons as Louis Drake,—this was holden to be evidence to go to the jury, to say whether he was not a bastard, and whether he had not acquired this name of Drake by reputation. *R. v. Drake*, 14 *Shaw's J. P.* 483. So, if the name in the indictment be spelt differently from the real and usual mode of spelling it, but be *idem sonans* with it, (and whether it be *idem sonans* seems to be a question to be left to the jury), it will be sufficient; otherwise not. *R. v. Davis*, 20 *Law J.* 207 *m.* But the indictment shall not be holden insufficient, because any person therein-mentioned is designated by a name of office, or other descriptive appellation, instead of his proper name. 14 & 15 *Vict. c.* 100, *s.* 24.

If, however, the name of the party be unknown, he should be described as "a person to the jurors aforesaid unknown;" 2 *Hawk. c.* 25, *s.* 71, and see *R. v. Mary Smith*, 6 *Car. & P.* 151; but if afterwards at the trial it appear that the party is known, the defendant must be acquitted. Where the prisoner was indicted for plundering a vessel which had been wrecked, and the property was laid, in the first count, to belong to persons therein-named, and in the second count to belong to persons unknown; at the trial, the witnesses did not know the christian names of the owners, so that the first count could not be proved; and the counsel for the prosecution then proposed to rely upon the second count: but Richards, C. B., held that the defendant must be acquitted; his lordship said, "The owners it appears are known, but the evidence is defective on this point; how can I say that the owners are unknown? I remember a case at Chester, where the property was laid as belonging to a person unknown, but upon the trial it was clear that the owner was known, and might easily have been ascertained by the prosecutor; and Lord Kenyon accordingly directed an acquittal." *R. v. Robinson*, *Holt*, 505. So, where an indictment against an accessory before the fact to a larceny, stated the larceny to have been committed by a person unknown, and the grand jury found the bill on the evidence of a person who acknowledged that he had committed the larceny: Le Blanc, J. ordered the defendant to be acquitted. *R. v. Walker*, 3 *Camp.* 264. Where a man named Daniel Campbell was indicted for the manslaughter of a woman, who, in the first count was called Catherine Macgennis, in the second, Catherine Campbell, and in the third, a person to the jurors unknown; and it appeared in evidence that her christian name was not known, that there was no proof of her surname being Macgennis, and the only proof of her name being Campbell, was, that the prisoner at one time stated her to be his wife, though he afterwards denied it: Erskine, J. left it to the

jury to say whether she was the wife of the prisoner, for if so, she was entitled to the name of Campbell, though not to that of Catherine, but if she was not his wife, and the jury believed that her name could not with due diligence have been ascertained, then she was a person unknown within the meaning of the third count: the jury acquitted the prisoner. *R. v. Campbell*, 1 Car. & K. 82. In another case, where a woman named Stroud was indicted for the murder of her illegitimate child, which in the first count was called "Harriet Stroud," and in the second as "a female of tender age, whose name is to the jurors aforesaid unknown;" the evidence was, that the child was baptized by the name of Harriet, and not Harriet Stroud; the prisoner was found guilty; but the case being reserved for the opinion of the judges, they held that she ought not to have been convicted on either count: not on the first count, because the child's name was not proved to be Harriet Stroud; and not on the second, because the child had a name, "Harriet," by which it might have been described in the indictment. *R. v. Sarah Stroud*, 1 Car. & K. 187. But where a woman was indicted for murdering her illegitimate child immediately after its birth, and it was neither described by any name, nor as a child whose name to the jurors was unknown: the woman being acquitted of the murder, but convicted of concealing the birth, this seeming defect in the indictment was made the subject of a motion in arrest of judgment; but Coleridge, J., held the indictment to be correct; the child being illegitimate, could have no name but by reputation, and it could not have acquired that at the time of its death; and to state in the indictment that its name was to the jurors unknown, was assuming that it had a name. *R. v. Willis*, 1 Car. & K. 722. And this decision was afterwards confirmed by the judges. *Id.*

By stat. 7 G. 4, c. 64, s. 14, in any indictment or information wherein it shall be requisite to state the ownership of any property whatsoever, whether real or personal, which shall belong to or be in the possession of more than one person, whether such persons be partners in trade, joint tenants, parceners, or tenants in common, it shall be sufficient to name one of such persons, and to state such property to belong to the person so named, and another or others, as the case may be; and whenever, in any indictment or information for any felony or misdemeanor, it shall be necessary to mention, for any purpose whatsoever, any partners, joint tenants, parceners, or tenants in common, it shall be sufficient to describe them in the manner aforesaid; and this provision shall be construed to extend to all joint stock companies and trustees. *See R. v. Boulton*, 5 Car. & P. 537. *R. v. Steel*, Car. & M. 337.

And with respect to the property of counties, ridings, and divisions, it is enacted, that in any indictment or information

for any felony or misdemeanor committed in, upon, or with respect to any bridge, court, gaol, house of correction, infirmary, asylum, or other building, erected or maintained in whole or in part at the expense of any county, riding, or division,—or on or with respect to any goods or chattels whatsoever, provided for or at the expense of any county, riding, or division, to be used for making, altering, or repairing any bridge, or any highway at the ends thereof, or any court or other such building as aforesaid, or to be used in or with any such court or other building,—it shall be sufficient to state any such property, real or personal, to belong to the inhabitants of such county, riding, or division, and it shall not be necessary to specify the names of any such inhabitants. 7 G. 4, c. 64, s. 15.

And with respect to the property of parishes, townships, and hamlets, it is enacted, that in any indictment or information for any felony or misdemeanor committed in, upon, or with respect to any workhouse or poor house, or on or with respect to any goods or chattels whatsoever, provided for the use of the poor of any parish or parishes, township or townships, hamlet or hamlets, place or places,—or to be used in any workhouse or poor house, in or belonging to the same,—or by the master or mistress of such workhouse or poor house,—or by any workmen or servants employed therein,—it shall be sufficient to state any such property to belong to the overseers of the poor for the time being of such parish or parishes, township or townships, hamlet or hamlets, place or places, and it shall not be necessary to specify the names of all or any of such overseers. 7 G. 4, c. 64, s. 16. And where goods were laid to be the property of “the overseers of the poor for the time being” of the parish of K., the judges held it to be sufficient, the words “for the time being” sufficiently importing that the goods were the property of those who were overseers at the time of the theft. *R. v. Went, R. & Ry.* 359.

The guardians of the poor of a union or parish, are by stat. 5 & 6 W. 4, c. 69, made a corporation, and are called “*the guardians of the poor of the — union, (or of the parish of —), in the county of —;*” and as such they may accept, take, and hold, for the benefit of such union or parish, any buildings, lands, or hereditaments, goods, effects, or other property, and by that name may prefer indictments; and in every such indictment relating to any such property, it shall be sufficient to lay or state the property to be that of the guardians of the — union, or of the parish of —.” 5 & 6 W. 4, c. 69, s. 7. 5 & 6 Vict. c. 57, s. 16.

And in any indictment or information for any felony or misdemeanor committed on or with respect to any materials, tools or implements for making, altering or repairing any highway within any parish, township, hamlet, or place, otherwise than

by trustees or commissioners of any turnpike road, it shall be sufficient to aver that any such things are the property of the surveyor or surveyors of the highways for the time being of such parish, township, hamlet, or place, and it shall not be necessary to specify the name or names of any such surveyor or surveyors. 7 G. 4, c. 64, s. 16.

And with respect to property under turnpike trusts, it is enacted, that in any indictment or information for any felony or misdemeanor committed on or with respect to any house, building, gate, machine, lamp, board, stone, post, fence, or other thing, erected or provided in pursuance of any Act of parliament for making any turnpike road, or any of the conveniences or appurtenances thereunto respectively belonging,—or any materials, tools, or instruments provided for making, altering, or repairing any such road,—it shall be sufficient to state any such property to belong to the trustees or commissioners of such road, and it shall not be necessary to specify the names of any such trustees or commissioners. 7 G. 4, c. 64, s. 17.

And lastly, with respect to property under the commissioners of sewers, it is enacted that in any indictment or information for any felony or misdemeanor committed on or with respect to any sewer or other matter within or under the view, cognizance or management of any commissioners of sewers, it shall be sufficient to state any such property to belong to the commissioners of sewers within or under whose view, cognizance, or management any such things shall be, and it shall not be necessary to specify the names of any such commissioners. 7 G. 4, c. 64, s. 18.

If in any of these cases, there should appear upon the trial to be a variance between the indictment and evidence, in the name or description of any person or body politic or corporate therein alleged to be the owner or owners of any property, real or personal, which shall form the subject of any offence charged therein,—or in the name or description of any person, or body politic or corporate, therein alleged to be injured or damaged or intended to be injured or damaged by the commission of such offence,—or in the christian name or surname, or both christian name and surname, or other description whatsoever, of any person or persons whomsoever therein named or described,—the court may order the indictment to be amended, if it consider the variance not material to the merits of the case, and that the defendant cannot be thereby prejudiced in his defence on the merits. 14 & 15 Vict. c. 100, s. 1.

Time.] Formerly, the indictment must have stated, either expressly or by way of reference, the day, month, and year on which each material fact stated in it, took place; otherwise the indictment would be bad. 2 Hawk. c. 25, s. 77. In felonies,

this was universally required; 2 *Hawk. c. 25, s. 77.* 2 *Hale*, 177, 178; as for instance, in an indictment for murder, time must have been stated, not only to the assault, but also to the stroke, and to the death. *Id.* But in misdemeanor, it was said not to be necessary to lay a time to every fact, as the time first laid was deemed to be connected with all the facts subsequently stated. 2 *Hale*, 178. And if the time so stated were repugnant, uncertain, or impossible, as if the indictment stated a fact to have occurred on a day subsequent to the filing of the bill, or an impossible day, or a day that never happened, it was bad. 2 *Hawk. c. 25, s. 77.* So, if it laid the offence to be committed in divers days between such a day and such a day, it would be bad. *Id. s. 82.* Where however the offence consisted of an omission, it was not necessary to allege any time to it. 2 *Hawk. c. 25, s. 79.*

But now, by stat. 14 & 15 Vict. c. 100, s. 24, no indictment for any offence shall be holden insufficient, "for omitting to state the time at which the offence was committed, in any case where time is not of the essence of the offence,—nor for stating the time imperfectly,—nor for stating the offence to have been committed on a day subsequent to the finding of the indictment,—or on an impossible day,—or on a day that never happened." The like defects were cured after verdict, by a previous statute, 7 G. 4, c. 64, s. 21.

But although the statement of time may now be dispensed with, in all cases where it is not of the essence of the offence, yet as it will be more satisfactory perhaps to the grand jury that some time should be stated, it will be advisable still to retain it, particularly in cases where the prosecution is limited to a certain time after the commission of the offence, as in treason, and in the case of murder, where the death must appear to have taken place within a year and day after the cause of it, 4 *Bl. Com.* 306, and the like. The manner of stating it is, by stating that the defendant, "*on the — day of —, in the year of our Lord —,*" or "*in the — year of the reign of our Sovereign Lady Victoria, by the grace of God, of the United Kingdom of Great Britain and Ireland, Queen, defender of the faith,*" did so and so, stating the act done; and the facts subsequently mentioned may be stated to have been done, "then," referring to the time before specifically stated. 2 *Hawk. c. 25, s. 78.* The year of the reign, or the year of our Lord, is stated indifferently: in the prosecutions of the regicides, in the reign of Charles the 2nd, every step in which was guided by the advice of the first lawyers in the kingdom, the year of our Lord, not the year of the reign, was stated in the indictments; 2 *Hawk. c. 25, s. 80*; and as mistakes often occur in using the year of the reign, it may be convenient in all cases to state the year of our Lord. But whether the day and year stated be the true date of the fact, is

Immaterial, unless it be of the essence of the offence; in other cases a variance between the time stated and that proved, will not be matter of objection. 2 *Hawk. c. 25, s. 81*. And by stat. 14 & 15 Vict. c. 100, s. 17, if upon the trial of an indictment for larceny, it shall appear that the property alleged to have been stolen at one time, was taken at different times, the prosecutor shall be at liberty to give in evidence three takings, within the period of six months between the first and the last of them.

Place.] It was necessary formerly to state a place by way of special venue, where every material fact was stated to have occurred; 2 *Hawk. c. 25, s. 83*; and not only the county must have been stated, but some parish or place within it. But as by the Jury Act, 6 G. 4, c. 50, s. 13, the jury, in criminal cases as well as civil, are returned of the body of the county generally, and not *de vicineto* as formerly, it became no longer necessary to state the parish or place, but the county merely. 1 *Arch. Peel's Acts*, 181 n. And now, by stat. 14 & 15 Vict. c. 100, s. 23, it shall not be necessary to state any venue in the body of any indictment, but the county, city, or other jurisdiction named in the margin thereof, shall be taken to be the venue for all the facts stated in the body of such indictment: provided, that in cases where local description is or hereafter shall be required, such local description shall be given in the body of the indictment: and provided also, that where an indictment for an offence committed in the county of any city or town corporate shall be preferred at the assizes of the adjoining county, such county of the city or town shall be deemed the venue, and may either be stated in the margin of the indictment, with or without the name of the county in which the offender is to be tried, or be stated in the body of the indictment by way of venue.

The cases where local description is necessary, as above mentioned, are such as indictments for burglary, house-breaking, stealing in a dwelling house, and the like, where the indictment must state the parish and county by way of local description; or indictments for not repairing highways, which must state the highway to be within the parish, &c.; and in these cases the matter of local description must be proved as laid. As to a variance, however, between the statement and proof, in this respect the indictment may now be amended, by stat. 14 & 15 Vict. c. 100, s. 1.

Statement of the offence.] Every offence must of course consist of certain facts and circumstances: in the case of an offence at common law, these facts, &c., are defined by the rule of the common law upon the subject; in offences against statutes, by the statute creating the offence. And the general rule of

pleading, with respect to this part of the indictment, is, that all the material facts and circumstances comprised in the definition of the offence, whether by a rule of the common law or by statute, must be stated; if any one material fact or circumstance be omitted, the indictment will be bad. If, for instance, in larceny, the indictment were merely to state that the defendant feloniously took the goods in question, without stating also that he carried them away, the indictment would be bad; as the carrying of them away is a material part of the definition of larceny. So, an indictment for murder, omitting the words *ex malitiâ præcogitatâ*, would be bad, even although it charge the defendant with having feloniously murdered the deceased, which implies malice. 2 *Hawk. c. 25, s. 110*. And the like in indictments upon statutes: if any one fact or circumstance, which is a material ingredient in the offence, as defined by the statute, be omitted, the indictment will be bad. 2 *Hawk. c. 25, s. 110—112*. But in an indictment on a statute, it is not necessary to aver that the defendant is not within the benefit of a proviso in it, even in cases where the statute in its purview expressly notices the proviso, as by saying that none shall do the thing prohibited, otherwise than in such special cases as are mentioned in this Act, *Id. s. 113*, or the like. Nor shall any indictment be deemed insufficient, for want of the averment of any matter unnecessary to be proved, 14 & 15 *Vict. c. 100, s. 24*, or for want of the statement of the value or price of any matter or thing, or the amount of damage, injury, or spoil, in any case where the value or price, or the amount of damage, injury, or spoil, is not of the essence of the offence. *Id.*

And the statement should be such as can be proved by the evidence in the case. But by stat. 14 & 15 *Vict. c. 100, s. 1*, whenever on the trial of any indictment for any felony or misdemeanor, there shall appear to be any variance between the statement in such indictment and the evidence offered in proof thereof,—in the name of any county, riding, division, city, borough, town corporate, parish, township, or place mentioned or described in any such indictment,—or in the name or description of any person or persons, or body politic or corporate, therein stated or alleged to be the owner or owners of any property real or personal, which shall form the subject of any offence charged therein,—or in the name or description of any person or persons, body politic or corporate, therein stated or alleged to be injured or damaged or intended to be injured or damaged by the commission of such offence,—or in the christian name or surname, or both christian name and surname, or other description whatsoever, of any person or persons whomsoever therein named or described,—or in the name or description of any matter or thing whatsoever therein named or described,—or in the ownership of any property named or described therein,—it shall and may be lawful for the court

before which the trial shall be had, if it shall consider such variance not material to the merits of the case, and that the defendant cannot be prejudiced thereby in his defence on such merits, to order such indictment to be amended, according to the proof, by some officer of the court or other person, both in that part of the indictment where such variance occurs, and in every other part of the indictment which it may become necessary to amend, on such terms as to postponing the trial, to be had before the same or another jury, as such court shall think reasonable; and after any such amendment, the trial shall proceed, whenever the same shall be proceeded with, in the same manner in all respects, and with the same consequences, both with respect to the liability of witnesses to be indicted for perjury, and otherwise, as if no such variance had occurred.

Intent.] The intent with which an act is done, is often made a material ingredient in the offence, as defined either by the common law or by statute; and when it is so, care must be taken to state in the indictment that the offence was committed with that intent, otherwise the indictment will be bad. But in forgery (which is defined to be the forging or uttering of certain instruments, “with intent to defraud any person whatsoever”), and in false pretences (which is defined to be the obtaining from another by a false pretence, any chattel, money, or valuable security, “with intent to cheat or defraud any person of the same,”) it is sufficient to allege the act to have been done “with intent to defraud,” without alleging the intent to defraud any particular persons. 14 & 15 *Vict. c. 100, s. 8*. And in all cases within stat. 7 & 8 *G. 4, c. 30 (Peel’s Act)*, as to malicious injuries, it is immaterial whether the offence shall be committed from malice conceived against the owners of the property in respect of which it shall be committed, or otherwise. 7 & 8 *G. 4, c. 30, s. 25*.

Statement must be positive.] The charge must be laid positively, and not inferentially or by way of recital merely. 2 *Hawk. c. 25, s. 60*. Therefore a material fact laid in an indictment after a “whereas,” would render the indictment bad. *Id.* So, the want of a direct allegation of anything material in the description of the substance, nature, or manner of the offence, cannot be supplied by any intendment or implication whatsoever; and therefore, in an indictment for murder, the omission of the words “*ex malitiâ præcogitatâ*,” is not supplied by the words, “*felonice murdravit*,” although the latter words imply them. *Id.* And the like, in other cases. But “*existens*” is a good introduction of an averment, when it has reference to the time of committing the offence. *Id. s. 61*.

Statement must be certain.] It has already been mentioned (*ante*, p. 86) that the indictment must state all the facts and

circumstances comprised in the definition of the offence, by the rule of the common law or statute on which the indictment is founded. And these must be stated with clearness and certainty, otherwise the indictment will be bad. The principal rule as to the certainty required in an indictment, may, I think, be correctly laid down thus: that where the definition of an offence, whether by a rule of the common law or by statute, includes generic terms, (as it necessarily must,) it is not sufficient that the indictment should charge the offence in the same generic terms as in the definition, but it must state the species,—it must descend to particulars. Wherefore an indictment for stealing “*bona et catalla*” of J. S., without further describing them, by stating what goods or chattels were intended, would be bad. 2 *Hawk. c. 25, s. 74. R. v. Powell*, 1 *Str.* 8. So, where a person was indicted for stealing “three eggs of the value of twopence,” Tindal, C. J., held the indictment to be bad, for not stating what sort of eggs they were; for all that appeared in the indictment, they might be adder’s eggs or other eggs, which could not be the subject of larceny. *R. v. Cox*, 1 *Car. & K.* 494. But where a man was indicted for stealing “one ham of the value of 10s., of the goods and chattels of Thomas Keighway,” and it was objected that the description was not sufficient, as it might be the ham of some wild animal, which would not be the subject of larceny: the judges however held it to be sufficient, for even if it were the ham of a wild animal, it might be of value, and the subject of larceny, the rule as to animals *feræ naturæ* applying only to the live animal. *R. v. Gallears*, 2 *Car. & K.* 981. 19 *Law J.* 13, *m.* So, where a man was indicted for stealing “one sheep,” and it appeared that the animal was between nine and twelve months old, and some of the witnesses called it a sheep, some a lamb, but the jury said that in common parlance it was called a lamb; the prisoner being convicted, the judges held the conviction to be right, as the word “sheep” being general, was applicable to one of that age, whatever it might in common parlance be called. *R. v. Spicer*, 1 *Car. & K.* 699. So, where the prisoner was indicted for receiving “twenty-eight pounds of tin,” and it appeared that what he had received were two lumps of tin, called in the trade ingots; and it was then objected that they ought to have been so called in the indictment: but Coleridge, J., held that they were properly described as so many pounds weight of tin; if the ingots were some article which in ordinary parlance was called by a particular name of its own, it would be improper to call it by the name of the material of which it was composed; in speaking of a piece of cloth, you could not call it so many pounds of wool, in speaking of sovereigns you could not call them so many ounces of gold; but here this is the material itself, and is properly described as so many pounds weight of tin; so in larceny of

a bar of iron, it would be properly described as so many pounds weight of iron. *R. v. Mansfield, Car. & M.* 140. But where a man was indicted for stealing "ten pounds in money numbered," the judges held the conviction to be wrong, because the indictment did not specify the species of coin stolen. *R. v. Fry, R. & Ry.* 482, *but see now stat. 14 & 15 Vict. c. 100, s. 18, post*, p. 91. So, it has been holden bad, to charge a man with "speaking divers false and scandalous words" of the mayor of a town, without setting out the words. *2 Hawk. c. 25, s. 59.* So, where an indictment, at the instance of a justice of the peace, charged a defendant that "*per diversa scandalosa, minacia et contemptuosa verba abusus fuit, et ipsum in executione officii sui prædicti vi et armis illicitè retardavit*," and it was demurred to as being too general; on the part of the prosecutor, it was admitted that the indictment was bad as to the words, but it was argued that it was sufficiently certain as to the obstruction: the court however held that it was bad as to that also; for it was not sufficient to say generally *retardavit*, but the act should have been specially set out. *R. v. How, 2 Str.* 699. So, where a defendant was convicted on an indictment, charging him with having obtained a certain promissory note by false tokens, the court upon motion arrested the judgment, because the false tokens were not specified in the indictment. *R. v. Munoz, 2 Str.* 1127. So, an indictment against a constable, charging that *malè et negligenter se gessit* in the execution of his office, was quashed by the court of King's Bench upon motion, as being too general. *R. v. Winteringham, 1 Str.* 2. *See also R. v. Robe, 2 Str.* 999. So, an indictment charging a man with being a common defamer, vexer, and oppressor; or a common disturber of the peace; or a common deceiver of the Queen's people,—or the like,—would be bad. *2 Hawk. c. 25, s. 59. 2 Hale, 182. See R. v. Brian et al., 1 Ad. & El.* 436 *m.*

The following exceptions to this rule as to the certainty required in indictments, have recently been made by *stat. 14 & 15 Vict. c. 100.*

1. In an indictment for murder or manslaughter, it shall not be necessary to set forth the manner in which, or the means by which, the death of the deceased was caused; but it shall be sufficient in every indictment for murder, to charge that the defendant did wilfully, feloniously, and of his malice aforethought kill and murder the deceased; and it shall be sufficient in every indictment for manslaughter, to charge that the defendant did feloniously kill and slay the deceased. *14 & 15 Vict. c. 100, s. 4.*

2. In an indictment for forging, uttering, stealing, embezzling, destroying, or concealing, or for obtaining by false pretences, any instrument, it shall be sufficient to describe such instrument by any name or designation by which the same may

be usually known, or by the purport thereof, without setting out any copy or fac-simile thereof, or otherwise describing the same or the value thereof. 14 & 15 *Vict. c. 100, s. 5.*

3. In an indictment for engraving or making the whole or any part of any instrument, matter, or thing whatsoever,—or for using or having the unlawful possession of any plate or other material upon which the whole or any part of any instrument, matter, or thing whatsoever shall have been engraved or made,—or for having the unlawful possession of any paper upon which the whole or any part of any instrument, matter, or thing whatsoever shall have been made or printed,—it shall be sufficient to describe such instrument, matter, or thing by any name or designation by which the same may be usually known, without setting out any copy or fac-simile of the whole or any part of such instrument, matter, or thing. 14 & 15 *Vict. c. 100, s. 6.*

4. In all other cases, wherever it shall be necessary to make any averment in any indictment as to any instrument, whether the same consist wholly or in part of writing, print, or figures, it shall be sufficient to describe such instrument by any name or designation by which the same may be usually known, or by the purport thereof, without setting out any copy or fac-simile of the whole or any part thereof. 14 & 15 *Vict. c. 100, s. 7.*

5. In every indictment in which it shall be necessary to make any averment as to any money, or any note of the bank of England or any other bank, it shall be sufficient to describe such money or bank note simply as money, without specifying any particular coin or bank note; and such allegation, so far as regards the description of the property, shall be sustained by proof of any amount of coin, or of any bank note, although the particular species of coin of which such amount was composed, or the particular nature of the bank note shall not be proved,—and, in cases of embezzlement,—and obtaining money or bank notes by false pretences,—by proof that the offender embezzled or obtained any piece of coin or any bank note, or any portion of the value thereof, although such piece of coin or bank note may have been delivered to him in order that some part of the value thereof should be returned to the party delivering the same, or to any person, and such part shall have been returned accordingly. 14 & 15 *Vict. c. 100, s. 18.*

In the time laid to each material fact, also, uncertainty was formerly as fatal as in the statement of the facts themselves; and therefore an indictment, charging the owner of a ferry with extorting several sums of money from several persons, between such a day and such a day, was holden void. 2 *Hawk. c. 25, s. 82.* But this defect, as far as respects the time laid, would now, it should seem, be cured by stat. 14 & 15 *Vict. c. 100, s. 24, ante, p. 85.*

Besides uncertainty, arising from too great generality of statement, an indictment may be uncertain in other respects, and therefore bad. As, for instance, where an indictment charged a miller, in the same count, with having received two several parcels of barley, of four bushels each, to be ground at his mill, and that he delivered three bushels of oat and barley meal, other and different from the produce of the said four bushels: the indictment was holden bad for uncertainty, as not showing as to which of the parcels of barley the offence was committed. *R. v. Haynes*, 4 *M. & S.* 214.

A charge also in the alternative, charging a defendant with having done so *or* so,—as that he murdered or caused to be murdered,—is bad for uncertainty. 2 *Hawk. c.* 25, *s.* 58.

Statement must not be repugnant.] One material part of an indictment, must not be repugnant to another, otherwise the indictment will be bad. 2 *Hawk. c.* 25, *s.* 62. Therefore if an indictment charge a man with forging an instrument by which A. was bound to B., it is bad, for A. could not be bound by the instrument if it were forged. *Id.* So, if an indictment for forcible entry charge that A. disseised B., and it appear on the face of the indictment that B. was not seised in fee: it is bad. *Id.* So, an indictment for selling iron by false weights and measures, has been holden bad for repugnancy, for it was absurd to say that it could be sold both by weight and measure at the same time. *Id.* 2 *Ro. Abr.* 18. But where an indictment charged Francis Morris as a receiver, “he the said Thomas Morris, well knowing,” &c., it was holden that the words, “the said Thomas Morris,” might be rejected as surplusage, and so the indictment be good. *R. v. Morris*, 1 *Leach*, 103. So where an indictment charged the defendant that he on one Henry Bennett did make an assault, “and him the said William Bennett did beat,” &c., this was holden good in arrest of judgment, for the same reason. *R. v. Crispin*, 12 *Shaw's J. P.* 323.

Technical words.] In some cases certain technical words are required, such as “treasonably and against his allegiance,” in indictments for treason, 2 *Hawk. c.* 25, *s.* 55. 4 *Bl. Com.* 307,—“murder,” and “of his malice aforethought,” in an indictment for murder, 2 *Hawk. c.* 25, *s.* 60. 4 *Bl. Com.* 307,—“ravish,” in an indictment for rape, 2 *Hawk. c.* 25, *s.* 56,—“burglariously,” in an indictment for burglary,—“feloniously,” in an indictment for felony, 2 *Hawk. c.* 25, *s.* 55. 2 *Hale*, 184, and the like: in these cases, no other words, nor any periphrasis whatever, would be deemed equivalent to them, and an indictment omitting them would be bad. So, an indictment upon statutes, where the definition of the offence contained in them, includes such adverbs as “unlawfully,” “wilfully,” “maliciously,” &c., the offence must be charged

to have been committed "unlawfully," "wilfully," or "maliciously" accordingly, otherwise the indictment will be bad. The word "unlawfully" is not essentially necessary in indictments at common law, 2 *Hawk. c. 25, s. 96*, although very generally used. The words, "with force and arms," were formerly always used in all indictments for offences with force, and indeed for all felonies, for a felony was deemed to include a trespass; and the words "as appears by the record" were always used, where a matter of record was pleaded: but now, by stat. 14 & 15 Vict. c. 100, s. 24, no indictment for any offence shall be held insufficient for the omission of the words, "as appears by the record," or of the words, "with force and arms."

4. *Conclusion of the Indictment.*

Against the peace.] All indictments, whether for offences at common law or by statute, conclude "against the peace of our Lady the Queen, her crown and dignity." 2 *Hawk. c. 25, s. 92*. The words "against the peace of our Lady the Queen," are in all cases deemed necessary; the words "her crown and dignity" not. *Id. s. 94*. If the offence be committed in the reign of one King, and the offender be indicted in the reign of his successor, the indictment should conclude, against the peace of the late King; *R. v. Lookup, 3 Burr. 1901*; or if commenced in the reign of one King, and continued into the reign of another, it seems that a conclusion, against the peace of both Kings, would be good. 2 *Hawk. c. 25, s. 93*. By stat. 14 & 15 Vict. c. 100, s. 24, however, no indictment shall be held insufficient, for the omissions of the words "against the peace." And the like omission was before cured by verdict, or judgment by confession, &c., by stat. 7 G. 4, c. 64, s. 20; which Act was holden to apply to the case of an indictment, in the reign of William the fourth, for an offence committed in the reign of George the fourth, concluding against the peace of our lord the King, &c., instead of our late lord the King. *R. v. Chalmers, Ry. & M. 352*, and see *R. v. Scott, R. & Ry. 415*.

In misdemeanors to the person or property of an individual, it is very usual to conclude "*To the great damage of the said J. S. to the evil example of all others in the like case offending, and against the peace*" &c.; but the above words in italics are unnecessary.

Against the form of the statute.] Indictments for offences against a statute or statutes, conclude "against the form of the statute [or statutes] in such case made and provided," and against the peace of our Lady the Queen, her crown and dignity. This is material to be observed; for where the *contra*

formam statuti is omitted, if the offence be one punishable by statute only, no judgment can be given, although otherwise if the offence be also punishable at common law. 2 *Hawk. c. 25, s. 116*. As the conclusion *contra formam statuti* to an indictment for an offence at common law, therefore, does not affect the validity of the indictment, I understand that the judges about fifteen years since, intimated to the clerks of indictments on the different circuits, that it would be advisable to conclude their indictments, generally, as for offences against a statute. Formerly nice distinctions were taken, as to cases where the conclusion should be *contra formam statuti*, and where *statutorum*; but this is now immaterial; for by stat. 14 & 15 Vict. c. 100, s. 24, no indictment shall be deemed insufficient, for the insertion of the words "against the form of the statute" instead of "against the form of the statutes," or *vice versa*.

Want of a proper conclusion.] By stat. 14 & 15 Vict. c. 100, s. 24, no indictment shall be held insufficient "for want of a proper or formal conclusion."

5. Joinder of Offences.

Several counts for the same offence.] There is no objection to stating the same offence, in different ways, in as many different counts of the indictment as you may think necessary, even although the judgment on the several counts be different, *R. v. Galloway, Ry. & M. 234*. See *R. v. Powell, 2 B. & Ad. 75*, provided all the counts be for felonies, or all for misdemeanors. And the judges have, upon more than one occasion, censured the practice of sending two bills before the grand jury, at the same time, against the same person, as for two different offences, founded on the same evidence of facts, even in cases where the two offences could not be joined in the same indictment, such as an indictment for stealing, and another for receiving the same goods. In this particular case, however, the indictor is now relieved of all difficulty; for by stat. 11 & 12 Vict. c. 46, s. 3, after reciting that according to the practice of courts of criminal jurisdiction, it was not then permitted in an indictment for stealing property to add a count for receiving the same property knowing it to have been stolen, or in an indictment for receiving stolen property to add a count for stealing the same property, and that justice was thereby often defeated,—it was enacted that in every indictment for feloniously stealing property, it shall be lawful to add a count for feloniously receiving the same property, knowing it to have been stolen; and in an indictment for feloniously receiving property knowing it to have been stolen, it shall be lawful to add a count for feloniously stealing the same property; and where any such indictment shall be preferred

and found against any person, the prosecutor shall not be put to his election, but it shall be lawful for the jury who shall try the same to find a verdict of guilty, either of stealing the property, or of receiving it knowing it to have been stolen ; and if such indictment shall be found against two or more persons, it shall be lawful for the jury who shall try the same, to find all or any of the said persons guilty, either of stealing the property or of receiving it knowing it to have been stolen, or to find one or more of the said persons guilty of stealing the property, and the other or others of them guilty of receiving it knowing it to have been stolen. So, where it was doubtful whether the accused party was an accessory before the fact, or the principal felon, you could not send two bills before the grand jury, one for each offence, being contrary to the injunction of the judges as above mentioned ; but as the accessory may now be indicted in the same manner as a principal, (*see ante*, p. 15, 17), he may now be convicted as a principal or accessory on the same count. So there are several cases where a greater offence includes a less, and upon an indictment for the greater offence, the prisoner may be found guilty of the less,—as for instance, upon an indictment for murder, the prisoner may be found guilty of manslaughter,—upon an indictment for burglary and larceny, the prisoner may be acquitted of the burglary, and found guilty of the larceny,—upon an indictment for breaking and entering a church, house, shop, or warehouse, and stealing therein, the prisoner may be acquitted of the breaking and entering, and convicted of the larceny,—in an indictment for stealing from a dwelling house to the value of five pounds, or some person in the house being put in fear, the prisoner may be convicted of the simple larceny,—and the like : in these cases, it is not necessary to have a separate bill, or even a separate count, for the less offence. Where a prisoner is indicted for a felony, it is not necessary to prefer a separate bill against him for an attempt to commit it,—or where he is indicted for a misdemeanor, it is not necessary to add another count for an attempt to commit it,—because upon an indictment for the felony or misdemeanor, if upon the trial it appear that the defendant merely attempted to commit the offence, but did not complete it, the jury may acquit him of the offence charged, and find him guilty of the attempt. 14 & 15 *Vict. c.* 100, *s.* 9. So, upon an indictment for robbery, the prisoner may now be found guilty of an assault with intent to rob. *Id. s.* 11. So, upon an indictment for embezzlement, if the offence upon the evidence appear to be a larceny, the jury may acquit the prisoner of the embezzlement, and find him guilty of simple larceny, or of larceny as clerk or servant. *Id. s.* 13. Or upon an indictment for larceny, if upon the evidence it appear to be embezzlement, the jury may acquit of the larceny, and find the party guilty of the embezzlement. *Id. s.* 13. So, if upon an indictment for obtaining money or

goods by false pretences, the offence upon the evidence turn out to be larceny, the defendant notwithstanding may be convicted of the false pretences. 7 & 8 G. 4, c. 29, s. 53. So, upon an indictment for any misdemeanor, if the facts given in evidence amount to a felony, the defendant shall not on that account be acquitted of the misdemeanor, unless the court think fit to discharge the jury, and order the defendant to be indicted for the felony. 14 & 15 Vict. c. 100, s. 12. In these several cases it is unnecessary and useless to prefer a second bill, or to add a second count (where that can be done), for the offence of which the defendant may be thus convicted; indeed, if a second bill be preferred, and the defendant be acquitted on the first, he may plead *autrefois acquit* to the second.

Second count for a different offence.] If different felonies or misdemeanors be stated in several counts of an indictment, no objection can be made to the indictment on that account in point of law. In cases of felony, indeed, the judge in his discretion, may require the counsel for the prosecution to select one of the felonies, and confine himself to that. This is what is technically termed putting the prosecutor to his election. But this practice has never been extended to misdemeanors. *Per Lord Ellenborough, C. J. in Young v. Rex, in error, 3 T. R. 98.* We have seen, however, (*ante*, p. 94) that where a count for larceny, and a count for receiving the same goods, are joined in the same indictment, the prosecutor shall not be put to his election. So a prosecutor may insert three counts in the same indictment for separate acts of larceny, committed by the same person against the prosecutor within six months from the first to the last of such acts; 14 & 15 Vict. c. 100, s. 16; and he shall not, in that case, be put to his election. Or, if there be but one count, for a stealing at one time, the prosecutor may give in evidence three larcenies, committed by the prisoner at different times within six months from the first to the last of them, and he shall not be put to his election. *Id.* s. 17. So, in an indictment for embezzlement by a clerk or servant, the prosecutor may insert three counts for separate acts of embezzlement, committed within six months from the first to the last of such acts; 7 & 8 G. 4, c. 29, s. 48; and he shall not in that case be put to his election.

But two offences cannot be charged in the same count; the count in such a case would be bad for duplicity. Where, however, in one count of an indictment on stat. 37 G. 3, c. 70, the defendant was charged with endeavouring to incite a soldier "to commit an act of mutiny, and to commit traitorous and mutinous practices,"—it was objected in arrest of judgment that the count was bad, as charging two offences; but the judges seemed to think it good, for there might be only one endeavour to incite to the two offences; the point however was

not decided, as there were other counts which were unobjectionable. *R. v. Fuller*, 1 *Bos. & P.* 180. So, where the lessee of a coal pit was charged in one count with stealing coal, the property of thirty different persons, who had mines in the vicinity of his, into which he caused his men to work and take the coal,—the prisoner's counsel moved that the counsel for the prosecution should select some particular act, done on a particular day, and confine his statement and evidence to that; but the judge (Erle, J.) refused to interfere; the case was then gone into, and proved, and the prisoner's counsel again objected to the count, as charging a stealing of the coal of several persons, in different places, and at different times: but the judge held that the different workings might be relied on to show the felonious intent, although they extended into twenty different counties, and the coal belonged to twenty different persons, and extended over twenty years, if the mining operations were continuous for that time. *R. v. Bleasdale*, 2 *Car. & K.* 765. So, there is no objection to charging a defendant in one count with assaulting two persons, when the whole forms one transaction. See *R. v. Benfield & Saunders*, 2 *Burr.* 984, *per Lord Mansfield, C. J.* So, an indictment for robbery, which charged *four* prisoners with assaulting A. B. and C. D., and stealing two shillings from A. B. and one shilling from C. D., the whole being one transaction,—was holden good by Tindal, C. J. *R. v. Giddins et al.*, *Car. & M.* 634.

6. Joinder of Defendants.

If several be engaged in the commission of the same offence, they may be joined in the same indictment, or each may be separately indicted. 2 *Hawk. c.* 25, *s.* 89. All principals in the first and second degree may be thus joined in the same indictment. See *ante*, p. 14. And where goods were obtained by false pretences, the pretence being by words spoken by one of the parties in the presence of the others, but all of them were acting in concert, it was holden that they might be jointly indicted. *R. v. Young et al.*, 3 *T. R.* 98. So in all misdemeanors, where those who in felonies would be accessories before the fact are principals, and are so indicted, the party who commits the offence, and he who incited him to commit it, may be indicted together as principals, in the same manner as if they were both present and acting in the commission of it. Therefore, where A. advised and encouraged B. to set fire to a malt house, and B. attempted to do so, but did not succeed, it was holden by Williams, J., that both might be indicted jointly for the attempt. *R. v. Clayton & Mooney*, 1 *Car. & K.* 128. So in felony, we have seen (*ante*, p. 15,) that the ac-

cessory before the fact may be indicted with the principal ; so may the accessory after the fact ; (*ante*, p. 18) ; or they may be tried separately. And by stat. 14 & 15 Vict. c. 100, s. 15, after reciting that it often happens that the principal in a felony is not in custody or amenable to justice, although several accessories to such felony, or receivers at different times of stolen property the subject of such felony, may be in custody and amenable to justice,—for the prevention of several trials, it is enacted that any number of such accessories or receivers may be charged with substantive felonies in the same indictment, notwithstanding the principal felon shall not be included in the same indictment, or shall not be in custody or amenable to justice. *See ante*, p. 17. But this is the only case in which several persons can be joined in the same indictment for several offences committed by them, independently of each other ; in all other cases it has been holden that, to convict all, a joint offence by all, either as principals in the first, or in the first and second degree, or as principals and accessories, must be proved. *See R. v. M'Phane et al.*, *Car. & M.* 212. But although a joint offence is laid, and can be proved, the indictment is considered in law as a several indictment against each. And if only one of two defendants so indicted as principals, be in custody at the time of the assizes or sessions when the indictment ought to be tried, he may be tried alone upon it, and whether he be convicted or acquitted, the other, when apprehended, may afterwards be tried upon it, and convicted. And so much is such an indictment considered a separate indictment against each, that where three were indicted for burglary and stealing in a dwelling house, and one pleaded guilty, and the two others were convicted of a larceny in the dwelling house only, the judges held that judgments should be entered against the three accordingly. *R. v. Butterworth et al.*, *R. & Ry.* 520. Where two persons were indicted for murder, A. in the first count being indicted as principal in the first degree, and B. present aiding and abetting, and in the second count B. was indicted as principal in the first degree, and A. with being present aiding and abetting ; and the jury found them guilty, but said they were not satisfied as to which of them actually committed the murder : the judges (*Maule, J., dis.*) held that the jury were not bound to find the defendants guilty on one of the counts only, but might find them guilty on both. *R. v. Downing et al.*, 1 *Den. C. C.* 52.

7. *Indictment, how Preferred and Found.*

Bills of indictment in ordinary cases are prepared in the indictment office at the assizes or sessions, by the proper
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officer there; they must be on parchment, and at quarter sessions are usually filled up on blank printed forms. But where the indictment is required to be special, or in any manner different from the common forms, or where any doubt or difficulty occurs as to the manner in which the indictment should be framed, it will be prudent to have it drawn, or at least settled by a barrister; and at the assizes, and at most quarter sessions, the fee paid in this respect is allowed to the prosecutor in costs. When drawn by a barrister, it must afterwards be engrossed on parchment, which is sometimes done by the prosecutor's attorney, but usually in the indictment office. The names of the witnesses intended to be examined before the grand jury, are then indorsed upon the bill, and the words "*sworn in court*" added after them.

The witnesses whose names are thus indorsed upon the bill, come into court; and the bill being given to the crier or other officer appointed for the purpose, he swears the witnesses, and the bill is then sent before the grand jury. The witnesses must be sworn in open court, and during the time the court is sitting.

The witnesses are then called in before the grand jury and examined by them. Sometimes a difficulty occurs before the grand jury, where the witness is not able to identify the prisoner by name, as the person who committed the offence. In a case of this kind, where five men were indicted for a rape and robbery, and the prosecutrix, although she could identify the prisoners upon seeing them, did not know their names,—the grand jury feeling a difficulty from want of evidence of identity, came into court and stated the matter to the judge: the judge (Tindal, C. J.) told them, that they might call some other witness on the back of the bill, who was present when the prisoners were before the magistrates, and upon the prosecutrix describing the prisoners, that witness would probably be able to state their names; but if the prisoners could not be identified in that mode, they should be brought before the grand jury. *R. v. Jenkins et al.*, 1 Car. & K. 536. If a majority of the grand jury (amounting to twelve at the least) be of opinion that the evidence adduced before them, makes out a sufficient case against the prisoner, to warrant his being put upon his trial before the petty jury, the foreman indorses on the bill "*a true bill*," and signs his name to it, "J. N., foreman." But if a majority of the grand jury be of a different opinion, then the words "*not a true bill*" are indorsed. And here it may be necessary to remark, that it is not the duty, or within the province of a grand jury, to go so minutely into the case, as to satisfy themselves of the guilt or innocence of the prisoner,—or, in other words, to try the case; their duty is confined simply to ascertaining whether there is sufficient evidence against him, to warrant his being put upon his trial;

it is for the petty jury afterwards to declare upon his guilt or innocence. The grand jury, having found one or more bills, come into court, and hand them to the clerk of arraigns at the assizes, or the clerk of the peace at sessions, who thereupon addresses them thus: "*Gentlemen of the grand jury, you are content that the court shall amend all matters of form, altering no matter of substance:—Against A. B., for [felony or a misdemeanor] you find a true bill;—against C. D., for,*" &c. The indictments are then filed by the officer, in the order in which he has thus received and called them over; but in what order they are to be afterwards tried, will depend upon the directions of the judge or the practice of the court.

Where the bill is against two or more defendants, the grand jury may find "a true bill" as to one or more, and "not a true bill" as to the others. So, where the bill contains two counts, the grand jury may find "a true bill" as to one count, and "not a true bill" as to the other. *R. v. Fieldhouse, Cowp. 325.* They cannot however find a true bill as to part of a count, and ignore the rest of it. *2 Hawk. c. 25, s. 2.* It is laid down indeed in the old text books, that where a bill for murder is preferred to a grand jury at the assizes, they may find it a true bill for manslaughter. But this is not done in modern practice; if a grand jury now intimate to the court their wish to find a true bill for manslaughter only, the judge will order the bill to be altered, so as to make it a bill for manslaughter, and will direct it to be again laid before the grand jury. If the jury ignore a bill, no other bill against the same party for the same offence, can be preferred during the same assizes or sessions. *R. v. Humphreys, Car. & M. 601.*

In what cases defendant to have a copy.] In all cases of prosecutions for misdemeanors, instituted by the attorney or solicitor general, the court shall, if required, order a copy of the information or indictment, free of expense, to be given to the party, after appearance. *1 G. 4, c. 4, s. 8.* And in prosecutions for high treason, a copy of his indictment shall be delivered to him ten days before his trial. *7 Ann. c. 21, s. 11.* But in no other case is the defendant entitled to it. The court, indeed, at the time of his arraignment, will order the indictment to be read over slowly to him; but no more. If however a prisoner be defended, this will be of little importance, as his counsel will have free access to the indictment. As to the defendant's right to have a copy of the depositions taken before the committing magistrate, *see ante*, p. 51.

8. Indictment, in what Cases amendable.

An indictment could not be amended at common law; nor was it within any of the old statutes of amendments. *2 Hawk.*

c. 25, ss. 97, 98. But now, by some modern and recent statutes an indictment may be amended, for the defects I am now about to enumerate.

For variance as to written instruments.] By stat. 9 G. 4, c. 15, any court of oyer and terminer and general gaol delivery, if such court shall see fit so to do, may cause the record on which any trial may be pending before any such court, in any indictment or information for any misdemeanor, [or for any offence whatever, 11 & 12 Vict. c. 46, s. 4], when any variance shall appear between any matter in writing or in print produced in evidence and the recital or setting forth thereof upon the record whereon the trial is pending, to be forthwith amended in such particular, by some officer of the court, on payment of such costs (if any) to the other party as such court shall think reasonable; and thereupon the trial shall proceed, as if no such variance had appeared. These two statutes expressly confined this power of amendment to courts of oyer and terminer and general gaol delivery. They did not therefore extend to courts of quarter sessions; for although justices of the peace by their commission have a power to hear and determine, the court of quarter sessions is not in law a court of oyer and terminer. But this was remedied, and the above statutes extended to the court of quarter sessions, by stat. 12 & 13 Vict. c. 45, s. 10.

For variance in other respects.] By stat. 14 & 15 Vict. c. 100, s. 1, whenever on the trial of any indictment for any felony or misdemeanor, there shall appear to be any variance between the statement in such indictment and the evidence offered in proof thereof,—in the name of any county, riding, division, city, borough, town corporate, parish, township, or place mentioned or described in any such indictment,—or in the name or description of any person or persons, or body politic or corporate, therein stated or alleged to be the owner or owners of any property, real or personal, which shall form the subject of any offence charged therein,—or in the name or description of any person or persons, body politic or corporate, therein stated or alleged to be injured or damaged or intended to be injured or damaged by the commission of such offence, —or in the christian name or surname, or both christian name and surname, or other description whatsoever, of any person or persons whomsoever therein named or described,—or in the name or description of any matter or thing whatsoever therein named or described,—or in the ownership of any property named or described therein,—it shall and may be lawful for the court, before which the trial shall be had, if it shall consider such variance not material to the merits of the case, and that the defendant cannot be prejudiced thereby in his defence

on such merits, to order such indictment to be amended, according to the proof, by some officer of the court or other person, both in that part of the indictment where such variance occurs, and in every other part of the indictment which it may become necessary to amend, on such terms as to postponing the trial to be had before the same or another jury, as such court shall think reasonable; and after any such amendment, the trial shall proceed, whenever the same shall be proceeded with, in the same manner in all respects, and with the same consequences, both with respect to the liability of witnesses to be indicted for perjury and otherwise, as if no such variance had occurred; and in case such trial shall be had at nisi prius, the order for the amendment shall be endorsed on the postea, and returned together with the record, and thereupon such papers, rolls, or other records of the court from which such record issued as it may be necessary to amend shall be amended accordingly by the proper officer; and in all other cases, the order for the amendment shall either be endorsed on the indictment, or shall be engrossed on parchment, and filed together with the indictment, among the records of the court: provided that in all such cases where the trial shall be so postponed as aforesaid, it shall be lawful for such court to respite the recognizances of the prosecutor and witnesses, and of the defendant, and his surety or sureties, if any, accordingly, in which case the prosecutor and witnesses shall be bound to attend to prosecute and give evidence respectively, and the defendant shall be bound to attend to be tried, at the time and place to which such trial shall be postponed, without entering into any fresh recognizances for that purpose, in such and the same manner as if they were originally bound by their recognizances to appear and prosecute or give evidence at the time and place to which such trial shall have been so postponed: provided also, that where any such trial shall be to be had before another jury, the crown and the defendant shall respectively be entitled to the same challenges as they were respectively entitled to before the first jury was sworn.

And by sect. 2, every verdict and judgment which shall be given after the making of any amendment under the provisions of this Act, shall be of the same force and effect in all respects as if the indictment had originally been in the same form in which it was after such amendment was made.

By sect. 3, if it shall become necessary at any time for any purpose whatsoever to draw up a formal record in any case where any amendment shall have been made under the provisions of this Act, such record shall be drawn up in the form in which the indictment was after such amendment was made, without taking any notice of the fact of such amendment having been made.

9. Indictments, when and how Quashed.

In all cases where an indictment is so defective, that any judgment to be given upon it against the defendant would be erroneous, the court in its discretion may quash it. *2 Hawk. c. 25, s. 146.* This may be done on the application either of the defendant or of the prosecutor. But the court will seldom interfere, upon the application of a defendant, where the indictment is for forgery, perjury, sedition, or for a nuisance to a highway; *Id.*; nor upon the application of a prosecutor, until after a good bill for the same offence, against the same party, shall have been preferred and found. *See R. v. Dunn, 1 Car. & K. 730; R. v. Wynn, 2 East, 296.*

An indictment may be thus quashed, as well by a court of quarter sessions, *R. v. Wilson et al., 14 Law J. 3 m.*, as by courts of oyer and terminer and gaol delivery, or by the court of Queen's Bench.

SECTION II.***Appearance and Plea.***

When the indictment has been found, if the defendant be not then in custody, or if out on bail and he have not surrendered, in pursuance of his recognizance, to take his trial, the first proceeding is, to sue out process, &c., upon the indictment, in order to have him apprehended; when in custody, he is brought to the bar of the court and arraigned, and he pleads or demurs; the prosecutor then replies, if the plea be special, or joins in demurrer, after which the case is ripe for trial or argument. I shall treat of these different proceedings under the following heads.

1. *Process upon Indictment, to Outlawry.*
2. *Arraignment and Plea.*
3. *Special Pleas.*
4. *Demurrer.*

1. *Process upon Indictment, to Outlawry.*

Process.] The regular process upon an indictment, in cases of treason, felony, or mayhem, is by *capias*, *alias* and *pluries*. *2 Hawk, c. 27, s. 15.* In cases of misdemeanor, the first process is the writ of *venire facias*; and if to that the sheriff return that the party has been summoned, then the prosecutor may have a *distringas*, *alias* and *pluries*, and so proceed by distress infinite; or if the sheriff return *nihil* to the *venire*,

the prosecutor may have a *capias*, *alias* and *pluries*. *Id.* s. 9, 10. See the forms of these writs, *Arch. Pr. Cr. Off.* 43, 44. But in practice these writs are never sued out, except for the purpose of proceeding to outlawry; but upon the indictment being found, the prosecutor, at the assizes or sessions, where the defendant is not in custody, procures a bench warrant, or the warrant of a justice of the peace, as shall presently be mentioned; or where the indictment has been found in the court of Queen's Bench, or removed into that court by *certiorari*, the prosecutor may procure a judge's warrant. See *Arch. Pr. Cr. Off.* 46, 47.

Outlawry.] Outlawry upon an indictment before judgment, lies in all cases of treason and felony, and in all cases of indictable misdemeanors in which a *capias* lies. See 2 *Hawk. c.* 27, s. 109. For this purpose, in misdemeanors there must be three writs of *capias*,—*capias*, *alias*, and *pluries*,—before the exigent; 2 *Hawk. c.* 27, s. 111; one is sufficient on an indictment for treason, murder, or manslaughter; *Id.* s. 112; but it is doubtful whether two writs of *capias* be not necessary in other felonies; *Id.*; and they are so, where the party is indicted at quarter sessions. 25 *Ed.* 3, st. 5, c. 14. *R. v. Yendall*, 4 *T.R.* 358. Besides this, in treason and felony, if the defendant reside in a different county from that in which he is indicted, a writ of *capias cum proclamations* must issue to the sheriff of the county in which he resides. 6 *H.* 6, c. 1, and see *Arch. Pr. Cr. Off.* 48, 49. If *non est inventus* be returned to these writs of *capias*, then the writ of exigent and the writ of proclamations may issue; and afterwards a writ of *allocatur exigent*, if necessary. *Arch. Pr. Cr. Off.* 48—50; and see the forms of these several writs, *Id.* 50, 51. And if he do not surrender, before the last of the proclamations, judgment of outlawry is signed; *Id.* 51, 52; and a writ of *capias utlagatum* may issue to apprehend the outlaw, or a special *capias utlagatum* to apprehend him and to seize all his property. *Id.* 52; and see the forms, *Id.*

Bench warrant.] Upon an indictment being found at the assizes or quarter sessions, if the defendant be not in custody, or if out on bail, and it be doubtful whether he will surrender to take his trial, the court upon application, will grant a bench warrant; 1 *Hale*, 599; upon which he may be apprehended as upon any other warrant, as mentioned *ante*, p. 33; and it may be backed, when necessary, as stated *ante*, pp. 33, 34.

In the central criminal court, the prosecutor applying for a bench warrant, must, before it issues, enter into a recognisance, such as the court shall direct, to prosecute the law with effect against the defendant. *Reg. Gen. Jan.* 1842. *Car. & M.* 254.

The following may be the form of a

Bench Warrant.

County of } To all constables, headboroughs, and other
 —, } officers and ministers of the peace of our
 Lady the Queen within the county of —,
 and to every of them, whom it may concern.

These are to will and require, and in Her Majesty's name strictly to charge and command, that you or some one of you, upon sight hereof, take and bring A. B. before [us, and others Her Majesty's justices assigned to keep the peace in the county aforesaid, and also to hear and determine divers felonies, trespasses and other misdemeanors committed in the same county], at this present sessions [of the peace] holden at —, in and for the said county, (if the court shall be here sitting), to answer to an indictment found against him for [state shortly the offence]; and if the court shall not be sitting at the time of such taking, then that you or some of you forthwith afterward bring the same party before some one or more of Her Majesty's justices of the peace for the same county, to find sufficient sureties personally to appear at this present sessions, to answer the same indictment, and all such other matters as on Her Majesty's behalf shall be here objected against him; And if he cannot be taken during this present session, then that you bring him before some one or more of Her Majesty's justices of the peace for the same county, as speedily after as may be, to find such sureties, personally to appear at the next session [of the peace] to be holden for the said county, to answer as aforesaid, and further to be dealt with according to law.

Hereof you are not to fail at your peril.

[Given under our hands in open session] this — day of —, in the year of our Lord —.

Warrant of justice out of sessions.] By stat. 11 & 12 Vict. c. 42, s. 3, where any indictment shall be found by the grand jury in any court of oyer and terminer or general gaol delivery, or in any court of general or quarter sessions of the peace, against any person who shall then be at large, and whether such person shall have been bound by any recognizance to appear to answer to the same or not, the person who shall act as clerk of the indictments at such court of oyer and terminer or gaol delivery, or as clerk of the peace at such sessions, at which the said indictment shall be found, shall at any time afterwards, after the end of the sessions of oyer and terminer or gaol delivery or sessions of the peace at which such indictment shall have been found, upon application of the prosecutor, or of

any person on his behalf, and on payment of a fee of one shilling, if such person shall not have already appeared and pleaded to such indictment, grant unto such prosecutor or person a certificate of such indictment having been found;—and upon production of such certificate to any justice or justices of the peace for any county, riding, division, liberty, city, borough, or place in which the offence shall in such indictment be alleged to have been committed, or in which the person indicted in and by such indictment shall reside or be, or be supposed or suspected to reside or be, it shall be lawful for such justice or justices, and he and they are hereby required, to issue his or their warrant to apprehend such person so indicted, and to cause him to be brought before such justice or justices, or any other justice or justices for the same county, riding, division, liberty, city, borough, or place, to be dealt with according to law; and afterwards, if such person be thereupon apprehended and brought before any such justice or justices, such justice or justices, upon its being proved upon oath or affirmation before him or them that the person so apprehended is the same person who is charged and named in such indictment, shall, without further inquiry or examination, commit him for trial, or admit him to bail, in manner before mentioned.

The following is the form of the

Certificate of Indictment being found.

I hereby certify, that at [a court of oyer and terminer and general gaol delivery, or a court of general quarter sessions of the peace,] holden in and for the [county] of—, at —, in the said [county], on —, a bill of indictment was found by the grand jury against A. B., therein described as A. B. [late of —, labourer,] for that he [&c., stating shortly the offence], and that the said A. B. hath not appeared or pleaded to the said indictment.

Dated this — day of —, 185—.

J. D.

Clerk of the indictments on the — circuit,
or

Clerk of the peace of and for the said [county].

The reader will perceive that this certificate can only be obtained after the assizes or sessions; for during the assizes or sessions the prosecutor may obtain a bench warrant. But it is not only in cases where the prosecutor has omitted to apply for a bench warrant during the assizes or sessions, but also where he has applied and got it, that this mode of obtaining a justice's warrant to apprehend a party indicted may be useful;

for it may often happen that whilst the bench warrant is in possession of a constable in another county, or in a distant part of the same county, there may be an opportunity of apprehending the defendant in another part of the county or in another county.

The following is the form of the

Warrant to Apprehend the Person indicted.

To the constable of —, and to all other peace officers in the said [county] of —.

Whereas it hath been duly certified by J. D., clerk of the indictments on the — circuit [or clerk of the peace of and for the [county] of —,] that, [&c., stating the certificate]: These are therefore to command you, in Her Majesty's name, forthwith to apprehend the said A. B., and to bring him before [me], or some other justice or justices of the peace in and for the said [county], to be dealt with according to law.

Given under my hand and seal, this — day of —, in the year of our Lord —, at —, in the county aforesaid.

J. S. [L. S.]

The following is the form of the

Warrant of Commitment of the Person indicted.

To the constable of —, and to the keeper of the [common gaol, or house of correction,] at —, in the said [county] of —.

Whereas by [my] warrant under my hand and seal, dated the — day of —, after reciting that it had been certified by J. D. [&c., as in the certificate], [I] commanded the constable of —, and all other peace officers of the said county in Her Majesty's name, forthwith to apprehend the said A. B., and bring him before [me], the undersigned, [one] of Her Majesty's justices of the peace in and for the said [county], or before some other justice or justices of the peace in and for the said [county], to be dealt with according to law: And whereas the said A. B. hath been apprehended under and by virtue of the said warrant, and being now brought before [me], it is hereupon duly proved to [me] upon oath that the said A. B. is the same person who is named and charged in and by the said indictment: These are therefore to command you the said constable, in Her Majesty's name, forthwith to take and safely convey the said A. B. to the said [house of correction] at —, in the said [county], and there to deliver him to the keeper thereof, to—

gether with this precept; and I hereby command you the said keeper to receive the said A. B. into your custody in the said house of correction, and him there safely to keep until he shall be thence delivered by course of law.

Given under my hand and seal, this — day of —, in the year of our Lord —, at —, in the [county] aforesaid.
J. S. [L. S.]

Or if the party indicted be confined in prison for any other offence than that charged in the indictment, at the time of such application, the justice, upon the like proof of identity, shall issue his warrant directed to the keeper of the prison, to detain him, until he shall be removed by habeas, for the purpose of being tried. 11 & 12 Vict. c. 42, s. 3.

The following is the form of a

Warrant to detain a Person indicted who is already in Custody for another Offence.

To the keeper of the [common gaol or house of correction] at —, in the said [county] of —.

Whereas it hath been duly certified by J. D., clerk of the indictments on the — circuit [or clerk of the peace of and for the county of —], that [&c., stating the certificate]: And whereas [I am] informed that the said A. B. is in your custody in the said [common gaol] at —, aforesaid, charged with some offence or other matter; and it being now duly proved upon oath before [me], that the said A. B. so indicted as aforesaid, and the said A. B. in your custody as aforesaid, are one and the same person: These are therefore to command you, in Her Majesty's name, to detain the said A. B. in your custody in the [common gaol] aforesaid, until by Her Majesty's writ of habeas corpus he shall be removed therefrom for the purpose of being tried upon such indictment, or until he shall otherwise be removed or discharged out of your custody by due course of law.

Given under my hand and seal, this — day of —, in the year of our Lord —, at —, in the [county] aforesaid.
J. S. [L. S.]

2. Arraignment and Plea.

Arraignment.] When a person, against whom the grand jury have found a true bill, is in custody, the clerk of arraigns at the assizes, or clerk of the peace at sessions, orders the gaoler to bring him to the bar. When he appears, the clerk addresses him thus: "A. B., hold up your hand: You

stand indicted by the name of A. B., [late of, &c.] for that you, on the — [&c., as in the indictment, to the end, except that it is addressed to the prisoner in the second person, and that the second and subsequent counts are stated shortly]: How say you, A. B., are you guilty of this [felony] whereof you stand indicted, or not guilty?"

Upon an indictment for a subsequent offence after a previous conviction, the prisoner is to be arraigned upon the whole indictment, including the former conviction; and if he plead not guilty, then the jury in the first instance are charged with the subsequent offence, and only that part of the indictment read to them which relates to it; and if they find him guilty, then (without their being again sworn) that part of the indictment relating to the previous conviction is read to them, and they are charged with it; and if they find that he was previously convicted, then a verdict of guilty on the whole indictment is entered. This has been determined to be the proper course, by the whole body of the judges, upon full consideration. *Per Lord Campbell, C. J., in R. v. Shuttleworth, 21 Law J. 36, m. See post, p. 624.* In cases of murder or manslaughter, where, besides the indictment, there is also a coroner's inquisition, it is usual to arraign the prisoner on the inquisition immediately after arraigning him on the indictment, and to try him on both at the same time. *1 East, P. C. 371.*

The holding up of the hand is a mere ceremony, and not of any importance. It is principally done where there are two or more arraigned upon the same indictment, for the purpose of ascertaining which of them is A. B., which C. D., &c. *2 Hawk. c. 28, s. 2. R. v. Ratcliffe, 1 W. Bl. 3.* But the court will not dispense with the prisoner's standing at the bar, whatever his station in life may be, particularly in cases of felony. *R. v. Douglas, Car. & M. 193.* In this latter case, however, (which was the case of Captain Douglas, who surrendered to take his trial for being second to Lord Cardigan, in a duel with Captain Tuckett), Williams, J., allowed several of the prisoner's friends to stand beside him in the dock. In a subsequent case, where a foreigner, who was a merchant in London, was indicted for fitting out a ship to be employed in the slave trade, his counsel applied that the prisoner might sit by him instead of going into the dock,—not on account of his station in life, but because he was a foreigner, and many of the documents in the case were in a foreign language, which would render it necessary for his counsel from time to time to communicate with him personally for the purposes of his defence,—the court (Maule & Wightman, JJ.), however, held that the application was one which could not be granted. *R. v. Pedro de Zulueta, 1 Car. & K. 215.*

Formerly, when there was more danger of rescue and escapes

than there is at present, it was no uncommon thing for prisoners to be brought to the bar of the court in irons. And they were obliged to stand at the bar in irons during the arraignment, and until they had pleaded, the judges saying that they had no authority to order them to be struck off until the trial. *R. v. Laver*, 16 *How. St. Trials*, 94, 99, 129. *R. v. Waite*, 2 *East, P. C.* 570. 1 *Leach*, 28. 36. At the trial, however, the irons were always struck off. *Id.*

Standing mute, &c.] If any person, being arraigned upon or charged with any indictment or information for treason, felony, piracy, or misdemeanor, shall stand mute of malice, or will not answer directly to the indictment or information: in every such case it shall be lawful for the court, if it shall so think fit, to order the proper officer to enter a plea of "not guilty" on behalf of such person; and the plea so entered shall have the same force and effect, as if such person actually pleaded the same. 7 & 8 *G. 4, c. 28, s. 2.* And to ascertain whether a person who stands mute, is mute of malice or by the visitation of God, the judge will immediately charge the jury to try this collateral issue; and the gaoler, or such other person as can give evidence upon the subject, shall be sworn and examined. *See R. v. Mercier*, 1 *Leach*, 183. *R. v. Steele*, 1 *Leach*, 451. Where a prisoner, upon his arraignment stated that he was deaf, and upon the indictment being read over to him he appeared not to understand it: Gifford, C. J., immediately directed a jury to be impanelled, to try whether he stood mute of malice, or by the visitation of God. *R. v. Hulton*, 1 *Ry. & M.* 78. Where a prisoner, who had already been tried and convicted, but whose trial was deemed a nullity on the ground of some informality in the swearing of the witnesses who gave evidence before the grand jury, was again arraigned upon an indictment for the same offence, and refused to plead, alleging that he had already been tried: Littledale, J., and Vaughan, B., ordered a plea of not guilty to be entered for him, under the above statute. *R. v. Bitton*, 6 *Car. & P.* 92. But if the jury, upon being so impanelled, find that the prisoner is insane, the court shall record such verdict, and order the party to be kept in strict custody, in such place and in such manner as to them shall seem fit, until Her Majesty's pleasure shall be known. 39 & 40 *G. 3, c. 94, s. 2.* *See ante*, p. 4, 5.

Plea.] Upon being asked whether he is guilty or not guilty, the defendant may plead *ore tenus* "not guilty," of which the clerk of arraigns or clerk of the peace makes a minute on the indictment, and puts it into form, if it afterwards becomes necessary to make up the record. Formerly the clerk of the peace asked the defendant also, how will you be tried? and

he answered, "by God and my country." But now, by stat. 7 & 8 G. 4, c. 28, s. 1, if any person, not having the privilege of peerage, being arraigned for treason, felony, or piracy, shall plead thereto a plea of "not guilty," he shall by such plea, without any further form, be deemed to have put himself upon the country for trial; and the court shall, in the usual manner, order a jury for the trial of such person accordingly.

If, instead of pleading "not guilty," the defendant say that he is "guilty," this is a confession of the offence, which subjects him precisely to the same punishment, as if he were tried and found guilty by verdict. But as defendants often imagine that, by pleading guilty, they are likely to receive some favour from the court in the sentence that will be passed upon them, the judge very frequently undeceives them in that respect, and apprizes them that their pleading guilty will make no alteration whatever in their punishment. If, however, they still persist in their plea of guilty, it is then recorded by the clerk of arraigns or clerk of the peace; and in the record, when made up, the judgment immediately follows the plea.

Traverse.] Formerly, in all cases of misdemeanors, the defendant was not bound to submit to be tried at the same assizes or sessions at which the bill was found, but had a right to traverse it, that is to say, to put off his trial, until the next following assizes or sessions for the same county. This was afterwards somewhat modified by stat. 1 G. 4, c. 4. But now, by stat. 14 & 15 Vict. c. 100, s. 26, that statute is repealed; and by sect. 27, no person, prosecuted, shall be entitled to traverse or postpone the trial of any indictment found against him at any session of the peace, session of oyer and terminer, or session of gaol delivery: provided always, that if the court, upon the application of the person so indicted or otherwise, shall be of opinion that he ought to be allowed a further time, either to prepare for his defence or otherwise, such court may adjourn the trial of such person to the next subsequent session, upon such terms as to bail or otherwise as to such court shall seem meet, and may respite the recognizances of the prosecutor and witnesses accordingly, in which case the prosecutor and witnesses shall be bound to attend to prosecute and give evidence at such subsequent session without entering into any fresh recognizance for that purpose.

3. *Special Pleas.*

Pleas in abatement.] A defendant is not allowed in criminal cases, as in civil actions, to plead in abatement that another indictment is pending against him for the same offence;

2 *Hawk.* c. 84, s. 1; and if he go on to show that he was acquitted or convicted on the former indictment, the plea is then a plea in bar, not in abatement. But the only pleas in abatement in criminal cases are, that the indictment gives the defendant no christian or first name or a wrong one, no surname or a wrong one, no addition of degree or mystery or a wrong one. But this is now of no use; for by Stat. 7 G. 4, c. 64, s. 19, no indictment or information shall be abated by reason of any dilatory plea of misnomer, or of want of addition or wrong addition of the party offering the plea, but in such a case the court shall forthwith cause the indictment or information to be amended according to the truth, and shall call upon the party to plead thereto, and shall proceed as if no dilatory plea had been pleaded. And by stat. 14 & 15 Vict. c. 100, s. 24, no indictment shall be holden insufficient, for want of, or imperfection in, the addition of any defendant. *See ante*, p. 78.

Auterfois acquit.] That the defendant was formerly indicted and acquitted, is a good plea in bar to a subsequent indictment for the same offence; 2 *Hale*, 241, 242. 2 *Hawk.* c. 35, s. 1; for the law will not suffer a man to be twice put in jeopardy for the same offence. *Id.* So, if a man be acquitted on an indictment for murder, he cannot afterwards be indicted for manslaughter of the same person, for he might have been convicted of manslaughter on the former indictment. 2 *Hale*, 246. So, if a man be indicted for burglary and larceny, and acquitted, he cannot afterwards be indicted for the larceny. After being indicted and acquitted on an indictment for felony, he cannot afterwards be indicted for an attempt to commit it, for he might have been convicted for the attempt on the previous indictment for the felony. *See* 14 & 15 Vict. c. 100, s. 9. For the same reason, a man, indicted and acquitted on an indictment for robbery, cannot afterwards be indicted for an assault with intent to commit it; *Id.* s. 11; a man indicted and acquitted for a misdemeanor, which, upon the trial, appears to be a felony, cannot afterwards be indicted for the felony; *Id.* s. 12; so, a person indicted and acquitted for embezzlement, cannot afterwards be indicted as for a larceny; or if tried and acquitted for a larceny, cannot afterwards be indicted as for embezzlement, upon evidence of the same facts; *Id.* s. 13; or if a man be indicted and acquitted of having, with others, received stolen goods, he cannot afterwards be indicted for separately receiving them. *Id.* s. 14. If a man be indicted and acquitted of obtaining goods by false pretences, he cannot afterwards be indicted upon the same facts as for a larceny; *see* 7 & 8 G. 4, c. 29, s. 53; but if he be indicted and acquitted of a larceny, he may afterwards be indicted upon the same facts for obtaining the goods or money under false pre-

tences. *R. v. Henderson et al.*, *Car. & M.* 328. If on a former indictment against an accessory before the fact, which specially charged him with inciting, &c., he was acquitted, he may afterwards be indicted as principal; 2 *Hawk. c.* 35, s. 12; but if he were indicted as principal on the former occasion, it would be otherwise. The former indictment, however, must appear to have been a good and valid indictment for the offence, and which might be supported by the same evidence as would support the present one. 2 *Hawk. c.* 35, s. 8. *R. v. Vandercombe*, 2 *Leach*, 708; and see *Vaux's case*, 4 *Co.* 45 a. *Wigg's case*, 4 *Co.* 46 b. And the acquittal must appear to have been before a court which had jurisdiction of the offence. Therefore, where a man was tried at the sessions in Southwark, and it appearing that the offence was committed a few yards within the city of London, the defendant was acquitted; being afterwards indicted in London for the same offence, he pleaded *auterfois acquit*: but the judges held the plea to be bad, as the sessions had no jurisdiction to try the offence. *R. v. Welsh*, *Ry. & M.* 175.

As to the form of the plea: by stat 14 & 15 Vict. c. 100, s. 28, it is enacted that "in any plea of *auterfois convict* or *auterfois acquit*, it shall be sufficient for any defendant to state that he has been lawfully convicted or acquitted (as the case may be) of the offence charged in the indictment."

The following therefore may be the form of a

Plea of Auterfois Acquit.

And the said A. B., in his own proper person, cometh into court here, and having heurd the said indictment read, saith that our Lady the Queen ought not further to prosecute the said indictment against him; because he saith that heretofore, to wit, at a sessions of oyer and terminer and general gaol delivery [or at the general quarter sessions of the peace] holden at —, in and for the county of —, he the said A. B. was lawfully acquitted of the said offence charged in the said indictment: And this he the said A. B. is ready to verify; wherefore he prays judgment, and that by the court here he may be dismissed and discharged from the said premises in the present indictment specified.

Replication thereto.

And hereupon E. F., [the clerk of arraigns or clerk of the peace] who prosecutes for our Lady the Queen in this behalf, saith that by reason of any thing in the said plea of the said A. B. above pleaded in bar alleged, our said Lady the Queen ought not to be precluded from further prosecuting the said

indictment against the said A. B.; because he saith that the said A. B. was not lawfully acquitted of the said offence charged in the said indictment, in manner and form as the said A. B. hath in his said plea above alleged; and this he the said E. F. prays may be inquired of by the country, &c. And the said A. B. doth the like. Therefore let a jury come, &c.

The usual replication formerly, when the record of the former acquittal was set out in the plea, was *nul tiel record*. But as in this modern form of plea the record is not set out, and there is of course no *prout patet per recordum*, and as there is no such thing as a trial by the record in criminal cases, but the trial in all cases must be by the country,—it seems to me that a mere general traverse of the plea is the proper replication in this case.

In proof of the plea, the record of the former acquittal must be made up; and if the former trial were at the quarter sessions, the court of Queen's Bench will, if necessary, grant a mandamus requiring the justices to make up the record. *R. v. JJ. of Middlesex*, 5 B. & Ad. 1113. And formerly the record or an examined copy of it must have been given in evidence by the defendant. But now, by stat. 14 & 15 Vict. c. 99, s. 13, (after reciting that it is expedient, as far as possible, to reduce the expense attendant upon the proof of criminal proceedings), it is enacted, that whenever in any proceeding, whatever it may be, it shall be necessary to prove the trial and conviction or acquittal of any person charged with any indictable offence, it shall not be necessary to produce the record of the conviction or acquittal of such person, or a copy thereof; but it shall be sufficient that it be certified or purport to be certified under the hand of the clerk of the court or other officer, having the custody of the records of the court where such conviction or acquittal took place, or by the deputy of such clerk or other officer, that the paper produced is a copy of the record of the indictment, trial, conviction, and judgment or acquittal, as the case may be, omitting the formal parts thereof.

If there be a variance between the former record and the present indictment, in the description of the offence, it may be made good by evidence, showing in substance that the proofs necessary to support the present indictment, would have been sufficient to convict him upon the former one.

If the verdict be in favour of the defendant, the judgment is that he be dismissed and discharged from the said premises in the present indictment specified, and that he go thereof without day. But if the verdict be against the defendant, then in felonies the judgment is of *respondeas ouster*; but in misdemeanors the judgment is final. *R. v. Taylor*, 3 B. & C. 502.

Auterfois convict or attaint.] If the defendant were formerly attaint or convicted of the same offence, he may plead it in bar to the present indictment. 2 *Hale*, 253. 2 *Hawk.* c. 36. And see *R. v. Scott*, 1 *Leach*, 401. *R. v. Bowman*, 6 *Car. & P.* 337. The observations already made respecting the plea of *auterfois acquit*, are equally applicable to this plea. The form of the plea is also the same, merely substituting the word "convicted" for "acquitted." Formerly *auterfois attaint* of another felony, was a bar to any subsequent indictment for felony, whilst the former attainder continued in force. But now, by stat. 7 & 8 G. 4, c. 28, s. 4, "no plea setting forth any attainder, shall be pleaded in bar of any indictment, unless the attainder be for the same offence as that charged in the indictment."

Pardon.] If a pardon have been granted to the defendant for the offence of which he is indicted, he may plead it in bar of the indictment. Formerly the pardon must have been under the great seal. But now, by stat. 7 & 8 G. 4, c. 28, s. 13, where the King, by warrant under his sign manual countersigned by one of his principal secretaries of state, shall grant to any felon a free or conditional pardon, the discharge of such offender out of custody in the case of a free pardon, and the performance of the condition in the case of a conditional pardon, shall have the effect of a pardon under the great seal, as to the felony for which such pardon shall be granted; but no pardon shall affect or mitigate the punishment of the offender for any felony committed by him after the granting of such pardon. The pardon however is only a bar to an indictment for the offence specified in it, and not for any other, committed before or after. *R. v. Harrod*, 2 *Car. & K.* 294.

Pleas to indictments for not repairing highways, &c.] Pleas to indictments for not repairing highways or bridges, showing that the inhabitants of some other district, or that some persons *ratione tenuræ* are bound to repair it,—are the only other special pleas, which occur in practice in criminal cases. As we shall have to notice this subject particularly, however, in the second part of the work, when we come to consider indictments in particular cases and the evidence necessary to support them, we shall defer treating of these pleadings until we treat of the subject altogether.

4. Demurrer.

A demurrer is a pleading, by which the legality of the last preceding pleading is denied and put in issue, and the issue is

then determined by the court. A demurrer is pleaded either to the indictment, or to a special plea.

Demurrer to indictment.] Formerly a demurrer to an indictment was unusual, because the defendant might have the same advantage of objecting, by motion in arrest of judgment, or writ of error. Afterwards certain defects in indictments were cured by verdict by stat. 7 G. 4, c. 64, s. 20, which therefore could only be taken advantage by demurrer. *R. v. Fenwick*, 2 Car. & K. 915. And now, by stat. 14 & 15 Vict. c. 100, s. 25, every objection to any indictment, for any formal defect apparent on the face thereof, shall be taken by demurrer or motion to quash such indictment, before the jury shall be sworn, and not afterwards; and every court before which any such objection shall be taken for any formal defect may, if it be thought necessary, cause the indictment to be forthwith amended in such particular by some officer of the court or other person, and thereupon the trial shall proceed as if no such defect had appeared. This however has only reference to formal defects; defects in substance may still be taken advantage of, where not cured or amended, by motion in arrest of judgment or writ of error, as before.

A demurrer in criminal cases, has the effect of opening the whole record to the court; and therefore upon arguing it, the defendant may take objections, as well to the jurisdiction of the court where the indictment was found, as to the subject matter of the indictment itself. *R. v. Fearnley*, 1 T. R. 516.

In misdemeanors, the judgment upon demurrer is final, and not merely that the defendant shall answer over. *Per Lawrence, J.*, in *R. v. Gibson*, 8 East, 112. But in capital cases the defendant is not concluded by the judgment on demurrer, but if the judgment be against him, he may still plead not guilty; and where a defendant in such a case demurs, it is usual for him at the same time to plead over to the felony. *R. v. Phelps et al.*, Car. & M. 180. *R. v. Adams et al.*, Id. 290. But in felonies not capital, it seems to be doubtful whether the judgment is final or merely a judgment of *respondeas ouster*. In *R. v. Bowen*, 1 Car. & K. 501, which was the case of a felony not capital, upon the defendant's counsel being about to demur, Tindal, C. J., cautioned him, saying that he might be bound by his demurrer and not allowed to plead over; he did not actually deliver an opinion upon the point, but expressed great doubt upon it, and the prisoner's counsel thereupon declined to demur, and the prisoner pleaded not guilty. And Hawkins merely says, generally, that in criminal cases not capital, if the defendant demur to the indictment, the court will not give judgment against him to answer over, but final judgment. 2 Hawk. c. 31, s. 7.

The following is the form of a

Demurrer to an Indictment.

And the said A. B., in his own proper person, cometh into court here, and having heard the said indictment read, saith, that the said indictment, and the matters therein contained, in manner and form as the same are above stated and set forth, are not sufficient in law, and that he is not bound by the law of the land to answer the same; and this he is ready to verify: Wherefore, for want of a sufficient indictment in this behalf, the said A. B. prays judgment, and that by this court here he may be dismissed and discharged from the said premises in the said indictment specified.

Joinder thereto.

And hereupon E. F., [the clerk of arraigns or clerk of the peace] who prosecutes for our Lady the Queen in this behalf, saith, that the said indictment and the matters therein contained, are sufficient in law to compel the said A. B. to answer the same; and he, the said E. F. is ready to verify and prove the same, as the court here shall direct and award: Wherefore, inasmuch as the said A. B. hath not answered to the said indictment, nor hitherto in any manner denied the same, the said E. F. for our said Lady the Queen, prays judgment, and that the said A. B. be convicted of the premises charged upon him in and by the said indictment.

Demurrer to plea.] If the defendant plead specially, the clerk of arraigns or clerk of the peace may, in like manner, demur to the plea. And if judgment be given for the crown, it is final in cases of misdemeanor, *R. v. Taylor*, 3 B. & C. 502, a judgment of *respondeas ouster* in capital felonies, and doubtful in felonies not capital, in the same manner as in the case of a demurrer to an indictment, which I have just now noticed.

The following is the form of a

Demurrer to a plea in bar.

And E. F., [the clerk of arraigns or clerk of the peace] who prosecutes for our Lady the Queen in this behalf, as to the said plea of the said A. B., by him above pleaded and set forth, saith, that the said plea and the matters therein contained, in manner and form as the same are above pleaded and set forth, are not sufficient in law to bar or preclude our said Lady the Queen from prosecuting the said indictment against him the said A. B., and that he the said E. F., for our said Lady the Queen, is not bound by the law of the land to answer the same; and this he the said E. F., who

prosecutes as aforesaid, is ready to verify: Wherefore, for want of a sufficient plea in this behalf, the said E. F., for our said Lady the Queen prays judgment, and that the said A. B. may be convicted of the premises above charged upon him in and by the said indictment.

Where in the case of a misdemeanor, the prayer of judgment was, that the defendant should answer over, instead of that he might be convicted, the court notwithstanding gave a final judgment. *R. v. Taylor*, 3 B. & C. 502.

Joinder thereto.

And the said A. B. saith, that his said plea by him above pleaded, and the matters therein contained, in manner and form as the same are above pleaded and set forth, are sufficient in law to bar and preclude our said Lady the Queen from prosecuting the said indictment against him; and the said A. B. is ready to verify and prove the same, as the court here shall direct and award: Wherefore, inasmuch as the said E. F., for our said Lady the Queen, hath not answered the said plea, nor hitherto in any manner denied the same, he, the said A. B. prays judgment, and that by this court here he may be dismissed and discharged from the said premises in the said indictment specified.

CHAPTER IV.

Evidence.

Having treated of the pleadings, up to the joining of issue, I shall in this chapter treat of the evidence by which that issue is to be proved; and I propose doing so under the following heads;—*

- Section 1. *What must be proved, and the Manner of proving it*
 2. *Written Evidence.*
 3. *Parol Evidence.*

SECTION I.

What must be proved, and the Manner of proving it.

1. *What must be proved, and by whom.*

By the prosecutor.] Where the defendant pleads not guilty, the prosecutor in all cases begins to give evidence, and must

* I have adopted here the same arrangement I used in treating of evidence in one of the earliest of my legal works, "*A Digest of the Law relative to Pleading and Evidence*

in Civil Actions," first published in 1816,—an arrangement I have followed ever since, when I have had occasion to treat of evidence in cases civil or criminal.

prove the defendant to be guilty of the offence charged against him, before the latter can be called upon for his defence. Even where an offence consists wholly or partly of an omission or negative, the prosecutor must prove the negative. And therefore where, upon an indictment for coursing deer in inclosed ground, without the consent of the owner, the question was, whether the onus lay upon the prisoner to prove that he had the consent of the owner : Lawrence, J., held, that it did not, but that it was incumbent on the owner to prove the negative ; and the owner not being in attendance, the prisoner was acquitted. *R. v. Rogers*, 2 Camp. 654. So, where, upon an indictment for lopping and topping trees in the night time, without the consent of the owner, it was proved that the prisoners had committed the offence in the night time, and when detected, had run away ; that the owner, after the offence was committed, had given orders for the apprehension of the prisoners, but died before the trial ; and the land-steward proved that he himself never gave consent, and he believed his master never did : Bayley, J., told the jury that they must be satisfied that the prisoners did not obtain the consent of the owner, but left it to them to say whether the facts proved did not furnish reasonable evidence of want of consent ; and the jury found the prisoners guilty. *R. v. Hazy & Collins*, 2 Car. & P. 458. But where an offence is created by statute, and an exception is made, either by another statute, or by another and substantive clause of the same statute, it is not necessary for the prosecutor, either in the indictment or by evidence, to show that the defendant does not come within the exception ; but it is for the defendant to prove the affirmative, and which he may do under the plea of not guilty. See *R. v. Pemberton*, 1 W. Bl. 230. See *ante*, p 86.

As to the facts, &c., to be proved : it is a general rule, that all the facts and circumstances stated in the indictment, which cannot be rejected as surplusage, must be proved ; as to what facts must be stated, I have already treated of that subject, *ante*, p. 86. But where a felony is made additionally penal by statute, if committed at a particular time or place, or under particular circumstances, then, if the time or place or circumstances be not proved, the offender may still be convicted of the simple felony : as, for instance, if upon an indictment for stealing from a dwelling house to the value of five pounds, if the prosecutor prove the larceny, but fail in proving the value, or that the stealing was from the dwelling house, the defendant may be found guilty of the simple larceny. If upon an indictment for breaking and entering a house, &c. and stealing therein, you prove the larceny, but fail to prove the breaking and entering, the prisoner may still be convicted of stealing in the dwelling house, or of the simple larceny. So, in all cases of offences which, either at common law or by

statute include others of a less degree of enormity, if you fail to prove the greater offence, but prove the less, the defendant may be convicted of the latter : as, for instance, upon an indictment for murder, if you fail to prove the malice prepense, express or implied, the defendant may be found guilty of manslaughter ; if upon an indictment for burglary and larceny, you prove the larceny, but fail in proving the breaking or entering, or that it was in the night time, &c., the defendant may be found guilty of stealing in the dwelling-house, or of the simple larceny ; if upon an indictment for a felony or misdemeanor, you fail in proving the offence completed, but prove an attempt to commit it, the defendant may be found guilty of the attempt ; 14 & 15 *Vict. c. 100, s. 9* ; if upon an indictment for robbery, you fail in proving the offence, but prove an assault with intent to commit it, the defendant may be convicted of the assault with intent to rob. *Id. s. 11*. And on the other hand, if the indictment contain a statement of any facts or circumstances not included in the definition of the offence, and which need not to have been stated, they may be rejected as surplusage, and need not be proved ; and this, as well in an indictment on a statute, as in an indictment for an offence at common law. *R. v. Jones, 2 B. & Ad. 611*.

The time need not be proved as laid, unless where it is of the essence of the offence. *Ante, p. 85*.

Place is immaterial, unless where it is matter of local description, such as the parish, &c., where the house or building is described to be in an indictment for burglary, or for breaking and entering a house, shop, warehouse, or a building within the curtilage, &c., in which cases the local description must be proved as laid. *Ante, p. 86*. Upon an indictment for treason or conspiracy, if you prove one good overt act in the county where the venue is laid, you may prove the others to have taken place in any other part of England. 2 *Hawk. c. 46, s. 184—189*. And upon an indictment against an accessory before or after the fact, he may be indicted in any place and before any court where his principal may be tried, no matter where the offence of accessory was committed. *Ante, p. 15. 18*.

Where the intent with which an act is done forms a material ingredient in an offence, we have seen (*ante, p. 88*) that it must be laid in the indictment ; and it must be proved as laid. There is some difficulty naturally in proving this ; for no man can tell what passes in the mind of another ; he can only judge of it from the other's admissions or overt acts. Where there is an admission of the intent, and the party proving it is believed, it is of course conclusive evidence of it. But where there is no admission, the prosecutor is then allowed to give in evidence any acts of the defendant, indicating his intention, or from which it can be presumed. Another mode of judging of

the intent, is by presuming that the party intended that which he effected, or that which is the natural consequence of the act with which he is charged : if the natural consequence of his act would be the death of another, a jury may fairly infer from the act that it was done with intent to kill such other person ; if the natural consequence of the act would be to defraud another, a jury may fairly infer from it an intent to defraud. In forgery formerly, the act was laid to be done with intent to defraud the party who was actually defrauded, or who would have been defrauded by it if the forgery had succeeded. In obtaining or attempting to obtain money or goods by false pretences, the act was laid to have been done with intent to defraud the party actually defrauded or attempted to be defrauded by it. But now, we have seen (*ante*, p. 88), that it is sufficient, in indictments for forgery, and for obtaining goods or money by false pretences, to allege the act to be done "with intent to defraud," without stating it to be to defraud any particular persons ; 14 & 15 *Vict. c. 100, s. 8* ; and no doubt the jury would be satisfied, from the nature of the act itself, that it was done for the purpose of defrauding some person. It may also often be material to prove that the act charged in the indictment was done wilfully, and did not occur merely by accident ; and in such a case, other acts of the defendant may be given in evidence, from which the jury may fairly infer that it was done wilfully. Where a man was indicted for setting fire to a stack of straw, and it appeared that it had been set on fire by the prisoner's having fired a gun very near to it ; the prosecutor having proved this, then proposed to prove that the stack had also been set fire to the day before, and that the prisoner was seen at the same time very near it with his gun : this was objected to, as being evidence of another felony ; but Maule, J., held it to be admissible ; he said that although it may be proof of another felony, that circumstance does not render it inadmissible, if the evidence be otherwise receivable : if a person were charged with having wilfully poisoned another, and it were a question whether he knew a certain white powder to be poison, evidence would be admissible to show that he knew what the powder was, because he had administered it to another person some short time before, who had died. *R. v. Dossett*, 2 *Car. & K.* 306. So, where upon an indictment for maliciously shooting at the prosecutor, it became a question whether it happened by accident or was done wilfully ; and the prosecutor, to show that it was done wilfully, was allowed to give in evidence that the prisoner had intentionally shot at him some time before ; and the judges held that the evidence was rightly received. *R. v. Voke*, *R. & Ry.* 531.

Malice is often a material ingredient in an offence, and expressed particularly in the definition of it. When this is the case, the indictment must state the act to have been mali-

ciously done, and the malice as well as the act must be proved. Malice is proved in the same manner as intent,—from the admissions or the overt acts of the offender. It may generally be inferred from the nature of the act itself: if a man do an act, which cannot be of any benefit to himself, or to those with or for whom he is acting, and which must necessarily be of injury to another person,—as if he wilfully set fire to the house of another, or to his manufactory, or to his ships, or to his stacks or crops of corn,—or if he destroy or damage his trees, plants, fences, &c., not meaning to steal them,—or if he kill or wound his cattle, &c., not meaning to steal them,—in these and the like cases the jury will be warranted in inferring that the act was done from malice to the owner or party injured. Such are the whole class of offences comprised in the stat. 7 & 8 G. 4, c. 30 (*Peel's Act*), relating to malicious injuries; but as that act comprised the offences of killing or wounding cattle, &c., and from some previously decided cases it appeared that such offences were sometimes committed out of malice to the animal, it was thought necessary to provide that in all offences within that statute, it is immaterial whether the offence shall be committed from malice conceived against the owner of the property in respect of which it shall be committed, or otherwise. 7 & 8 G. 4, c. 30, s. 25. Malice may also be implied, where no malice against any particular person in fact existed. Even in murder, which is the highest offence of this class, in which malice forms a most material ingredient, and where the malice must be preconceived, malice may in this way be implied, although none actually existed as against any particular person. As if a man, being on a horse which he knows to be used to kick, ride him amongst a crowd of persons, and the horse kick a man and kill him, the rider is guilty of murder, although he had no malice against any particular person, nor any other intention than that of diverting himself by frightening the persons around him. 1 *Hawk*, c. 31, s. 68. So, where a person fires a loaded pistol among an assembly of persons, or in the public streets where many persons are passing, and thereby kills a man, or the like, he is guilty of murder. See *R. v. Bailey, R. & Ry.* 1. So, in all other cases, where a man wilfully does an act, which he knows must or probably will cause the death of another, whom he knows not, and a man is thereby killed, he is guilty of murder, in the same manner as if he had preconceived malice against the individual killed.

Also, if a guilty knowledge form a material ingredient in the offence charged, it can only be proved from the admissions or the overt acts of the offender; and in the absence of admissions, the prosecutor may give in evidence any facts from which the jury may infer it. For instance, upon an indictment for knowingly uttering a forged bill of exchange, evidence

that the prisoner gave a false account of the parties to it, and, when he was apprehended, had other forged bills of exchange, all drawn upon the same parties, upon his person, this was holden to be properly received in proof of his guilty knowledge that the bill he was charged with uttering, was a forgery. *R. v. Hough, R. & Ry.* 120. So, upon an indictment for forging and uttering a bank of England note, which appeared to have been done with a camel hair pencil, the prosecutors, for the purpose of proving guilty knowledge, tendered in evidence another note, forged in the same manner, with the same materials, uttered by the prisoner about three months before, and two 10*l.* notes, and thirteen 1*l.* notes of the same fabrication, from the files of the bank, (but when received by them did not appear), all of which had the prisoner's handwriting on the back: the judge received the evidence, subject to the opinion of the judges as to its admissibility; and the judges afterwards held that it was admissible for the purpose, subject however to observations as to the weight of the evidence, which would be more or less considerable, according to the number of the other notes, the distance of time at which they were put off, the situation in life of the prisoner, so as to make it more or less probable that so many notes should pass through his hands in the regular way of business. *R. v. Ball, R. & Ry.* 132.

Also, where several offences of the same nature form parts of one entire transaction, it is in the discretion of the judge to confine the prosecutor to the proof of one, or to allow him to give evidence of the others also: as for instance, where a shopman being suspected of stealing from his employer's till, marked money was put into the till, and, being watched, he was observed going to the till, immediately after which some of the money was missed; at this part of the evidence at the trial, it was objected for the prisoner that the prosecutor should be confined to this instance, but the judge overruled the objection; it was then proved that shortly after, he was observed to go again to the till, that he took his hand out of it, clenched, and put it into his waistcoat pocket, and that the till being immediately examined, it was found that more of the money was gone from it; the prisoner was then apprehended and searched, and six shillings of the marked money found upon him: upon motion to stay the judgment, on the ground that evidence of another offence had been received, the court held that it was in the discretion of the judge to allow it; the two felonies were so connected, as to form parts of one entire transaction, and the one was evidence to show the character of the other. *R. v. Ellis, 6 B. & C.* 145. So, in other cases, there can be no objection that the evidence of one offence, proves the defendant to be guilty of another offence also. *R. v. Moore, 2 Car. & P.* 235. And now by stat. 14 & 15 Vict.

c. 100, s. 17, in the case of larceny, although the indictment state only one act of stealing, and at one time, yet if it appear that the property was in fact stolen at different times, the prosecutor shall not, by reason thereof, be required to elect on which taking he will proceed, unless it shall appear that there were more than three takings, or that more than the space of six calendar months elapsed between the first and the last of such takings; and in either of such last-mentioned cases, the prosecutor shall be required to elect to proceed for such number of takings, not exceeding three, as appear to have taken place within the period of six calendar months from the first to the last of such takings. 14 & 15 Vict. c. 100, s. 17.

By the defendant.] If the defendant plead specially, as where he pleads *autrefois acquit*, &c.,—or, upon an indictment against a parish for non-repair of a highway, where the defendants plead that others, and not the parish, are bound to repair,—the rule as to the right to begin, is the same as in civil actions, namely, that the party who adds the *similiter*, begins. When the plea is put in issue therefore, the defendant must prove it, in the same manner that a prosecutor must prove an indictment. Where the plea is *autrefois acquit* or *convict*, the defendant must get the former record made up, and produce a certified copy of it in evidence, as directed, *ante*, p. 113. He must also, if necessary, prove his identity with the party before acquitted or convicted, and the identity, in substance, of the offence in both cases.

Under the general issue, not guilty, the defendant may make what defence he can, showing that he is not guilty. And if indicted as accessory before or after the fact to a person named, he may contest the case of the prosecutor against that party, and show that he is not guilty; or if indicted as accessory to a person unknown, he may show that no felony in fact was committed. Under the general issue also, he may set up an *alibi* as a defence, and call witnesses to prove it; he may call witnesses to prove any other defence he may set up; or he may call witnesses to character,—in larceny, as to his honesty,—in murder, &c., as to his humanity,—in treason, as to his loyalty,—in riot, as to his peaceable disposition,—and the like. Witnesses to character are always useful: in doubtful cases they may affect or influence the verdict; or if the defendant be found guilty, they may have the effect of mitigating the punishment.

Variance.] I have already noticed this subject fully, in treating of the cases in which the court, at the trial, will amend the indictment. *See ante*, p. 99. I shall therefore notice it in this place very shortly.

If there be a variance between the indictment, and the evidence brought forward to sustain it, the court on application

will amend the indictment in the following instances :—where the variance is in the setting out of any matter in writing or in print,—or in the name of any county, city, town, parish, &c.,—or in the name of the owner of any property which is the subject of the indictment,—or in the name of any person injured, or intended so to be, by the offence charged,—or in the name of any person mentioned in the indictment,—or in the “name or description of any matter or thing whatsoever therein named or described,”—or in the ownership of property therein named or described. *See ante*, pp. 113, 114.

But there are some cases of variance, where an amendment is not necessary. Upon an indictment for embezzlement, if the evidence prove a larceny, the jury may acquit the prisoner of the embezzlement, and find him guilty of simple larceny, or of larceny as clerk or servant; 14 & 15 *Vict. c.* 100, *s.* 13; or upon an indictment for larceny, if the evidence prove an embezzlement, the jury may acquit the defendant of the larceny, and find him guilty of the embezzlement. *Id. s.* 13; upon an indictment for obtaining goods or money under false pretences, if the evidence prove a larceny, the defendant notwithstanding may be convicted of false pretences; 7 & 8 *G. 4, c.* 20, *s.* 53; upon an indictment for a misdemeanor, if the evidence prove a felony, the defendant shall not on that account be acquitted, unless the court think proper to discharge him from that indictment, and order him to be prosecuted for the felony; 14 & 15 *Vict. c.* 100, *s.* 12; upon an indictment against a principal in the first degree, if the evidence prove him to have been principal in the second degree,—or upon an indictment against him as principal in the second degree, if the evidence prove him to have been principal in the first degree,—he shall be convicted. *Ante*, p. 13.

There are also some cases, where the evidence proves only part of the charge laid, and the defendant shall be convicted of that part, and acquitted of the residue. Where a man is indicted for murder, he may be found guilty of manslaughter;—upon an indictment for burglary and larceny, he may be acquitted of the burglary, and found guilty of the larceny;—upon an indictment for breaking and entering a church, house, shop, or warehouse, and stealing therein, he may be acquitted of the breaking and entering, and convicted of the larceny;—upon an indictment for stealing from a dwelling-house to the value of five pounds, or some person therein being put in fear, the defendant may be convicted of the simple larceny;—upon an indictment for robbery, the jury may acquit him of the robbery, and convict him of an assault with intent to commit it; 14 & 15 *Vict. c.* 100, *s.* 11; so in all cases of indictments for felony or misdemeanor, if the evidence prove only an attempt to commit it, the defendant may be found guilty of the attempt. *Id. s.* 9.

2. *The Manner of proving the Matter in issue.**By Confessions.*

Confession to a prosecutor, constable, &c.] A confession by the defendant, if obtained fairly, and without holding out any inducement to him to make it, is nearly the strongest evidence that can be given of the facts stated in such confession, against the party making it; and is abundantly sufficient of itself, without any confirmation, to warrant a verdict against him. 2 *Hawk. c. 46, ss. 33. 39.* But it is only evidence against the party making it, and not against others, 2 *Hawk. c. 46, s. 34*, except perhaps in treason and conspiracy, in cases where the confession or declaration of one of the conspirators may amount to an overt act; see *R. v. Watson*, 2 *Stark. 140, 141*; and except upon indictments against the inhabitants of a parish or township, &c., where the admission of one is deemed evidence, though perhaps slight, against the parish or township generally. See *R. v. Whitby Lower*, 1 *M. & S. 636.* *R. v. Hardwick*, 11 *East, 578.* Even where one of three prisoners, on examination before a magistrate, stated that he and another of the prisoners committed the felony, and the other who was present did not deny it: Holroyd, J., held that this confession could not be given in evidence against the other prisoner, and he said that it had so been decided. *R. v. Appleby et al.*, 3 *Stark. 33.* *S. P. R. v. Swinnerton et al.*, *Car. & M. 593.* And where on the trial of two, a confession of one of them, affecting also the other, is to be given in evidence, the judge, if the confession be in writing, usually orders the officer, whose duty it is to read it, to read it in such a way as not to disclose the name of the other defendant; or if the confession be not in writing, many of the judges give a similar caution to the witness who proves it. This, however, is entirely discretionary.

A confession to be given in evidence, must be of the offence charged in the indictment, or of some matter relating to it: you cannot give in evidence any confession or declaration of the prisoner of his having committed similar crimes upon other occasions, or of his general disposition to commit them. *R. v. Cole*, 1 *Ph. Ev. 170.* *R. v. Butler*, 1 *Car. & K. 221.* But where there were two indictments against a prisoner, one for receiving tin, and the other for stealing iron,—on the trial for receiving the tin, it was holden that the whole of a statement made by him might be given in evidence, although only part of it related to the tin, the rest relating to the iron. *R. v. Mansfield*, *Car. & M. 140.* And on the other hand, the prisoner may insist on the whole of his confession being stated, for the part omitted may qualify or control the meaning of the part stated. 2 *Hawk. c. 46, s. 42.*

Also, a confession to be given in evidence, must not have

been upon any examination upon oath: if upon taking the examination of a prisoner before a magistrate, the prisoner be examined upon oath, his examination cannot afterwards be read against him at the trial. 2 *Hawk. c.* 46, *s.* 37. *And see R. v. Sandys et al., Car. & M.* 345. But where a prisoner was thus sworn by mistake, it being supposed that he was a witness, and, upon the mistake being discovered, the magistrate ordered the deposition to be destroyed, cautioned the party, and then took his examination: Garrow, B., held this latter examination to be receivable in evidence. *R. v. Webb, 4 Car. & P.* 564. Where a statement made by a prisoner upon oath, at a time when he was not under any suspicion, was tendered in evidence, Vaughan, B., held it to be admissible. *R. v. Tubby, 5 Car. & P.* 530. But in another case, upon a trial for administering poison, where it appeared that the prisoner and several other persons were examined upon oath before a magistrate upon the subject, no specific charge being at that time made against any person, but in the result the prisoner was committed for the offence: Gurney, B., refused to receive in evidence what the prisoner stated upon that occasion; the above case of *R. v. Tubby*, was cited, and he admitted he was disposed to agree with that decision, and mentioned a case of *R. v. Walker*, for forgery of a will, tried at the Old Bailey, where the prisoner's affidavit in the Ecclesiastical Court, was read in evidence against him; but he distinguished *R. v. Tubby*, from the present case, the examination in this case being taken at the time the prisoner was committed. *R. v. Lewis, 6 Car. & P.* 161. Another distinction, perhaps, might with propriety be taken, namely, between a case where the oath is merely voluntary, as the affidavit in *Walker's* case above mentioned, and where the party is in strictness bound upon his oath to speak the whole truth, as in an examination before a magistrate, or the like.

Without inducement.] If any inducement, by promise of favour or by threat, be held out to the prisoner,—as by telling him that he had better tell all he knew, *R. v. Kingston, 4 Car. & P.* 387, and see *R. v. Garner, 18 Law J.* 1 *m.*, 2 *Car. & K.* 920, or that he had better tell where he had got the property, *R. v. Dunn, 4 Car. & P.* 543, “I will forgive you if you tell the truth,” *R. v. Hewett, Car. & M.* 534, “you had better split, and not suffer for all of them,” *R. v. Thomas, 6 Car. & P.* 353, “it is of no use for you to deny it, for there are the man and boy who will swear they saw you do it,” *R. v. Mills, 6 Car. & P.* 146, “it would have been better if you had told at first,” *R. v. Walkley & Clifford, 6 Car. & P.* 175, “that unfortunate watch has been found, and if you do not tell me who your partner was, I will commit you to prison as soon as we get to Newcastle,” *R. v. Parratt, 4 Car. & P.* 570,—or the like: any confession the prisoner may have been

thereby induced to make, cannot be given in evidence against him. 2 *Hawk. c.* 46, *s.* 96. And where a female servant was indicted for attempting to set fire to her master's house, and it appeared that the bed furniture and bedding of two rooms had been set on fire, and that a silver spoon and a few other things had afterwards been found in the sucker of the pump; and the master stated at the trial, that he said to the prisoner that if she did not tell the truth about the things that were found in the pump, (but saying nothing about the fire), he would send for the constable: Coltman, J., refused to hear what the prisoner said in answer. *R. v. Hearn, Car. & M.* 109. So, a reward offered by government for the discovery of the persons who committed a murder, with a promise of pardon to any but the person who struck the blow,—if it can be proved that it came to the knowledge of the prisoner before he made any statement, will prevent that statement from afterwards being given in evidence against him. See *R. v. Boswell et al., Car. & M.* 584. See *R. v. Dingley et al., infra.*

But nothing short of a threat, or of a promise of favour with respect to the offence charged against the prisoner, will have this effect. Where a prisoner, on being charged with robbing her mistress, voluntarily said "I shall confess, for I think it will be best for me," to which her mistress said "I do not know that," but neither sanctioned her hope or checked it: it was holden that a confession made by the prisoner after that, was admissible in evidence. *R. v. Warren, 12 Shaw's J. P.* 571. Where a magistrate, before taking a prisoner's statement, said to him "be sure you say nothing but the truth, or it will be taken against you, and may be given in evidence against you at your trial," it was holden that a statement made by the prisoner after that, was admissible in evidence against him. *R. v. Holmes, 1 Car. & K.* 248. Where a confession was obtained from a boy of fourteen years of age, by questions put to him by the constable who apprehended him, and at a time when the boy had not had food for nearly a day, a majority of the judges held that the confession was receivable in evidence. *R. v. Thornton, Ry. & M.* 27. So, where a confession was obtained by means of questions from the magistrate, it was holden that it might be read in evidence against the prisoner at his trial; *R. v. Ellis, Ry. & M. N. P. C.* 432; yet such a mode of obtaining a confession is not very commendable, and ought to be avoided. Where a man, committed for murder, was visited by the chaplain of the gaol, who, in a long and very earnest discourse with him upon the necessity of repentance, and of confessing his sins, wrought so much upon the man's mind, that, in a subsequent interview with the gaoler, the prisoner said that he would tell him all about it; the gaoler told him not to say anything which he wished the magistrates not to know, as it would be his duty immediately to tell them of it; the prisoner said that he wished

it, and then gave the details of the murder: the judges were unanimously of opinion, that this confession was receivable in evidence. *R. v. Gilham, Ry. & M.* 186. So, where a man, committed with others for murder, told the chaplain of the prison that he wished to see a magistrate, and asked if any proclamation had been made, and any offer of pardon; and the chaplain answered that there had, but the prisoner must understand that he could not hold out to him any inducement to make any statement, as it must be his own free and voluntary act; and when the prisoner afterwards saw a magistrate, he told him that no inducement had been holden out to him to confess anything, but that what he was about to say was his own free and voluntary act, and he then made a statement: it was holden by Pollock, C. B., that this was receivable in evidence against the party, upon his subsequent trial with the others for the murder. *R. v. Dingley et al., 1 Car. & K.* 637. So, where a boy of ten years of age, after being enjoined by a clergyman to "speak the truth in the face of God," made a disclosure of his guilt to a policeman, it was holden to be admissible in evidence against him upon his trial. *R. v. Risborough, 11 Shaw's J. P.* 280. Where a constable told a prisoner "if you will tell where the property is, you shall see your wife," Patteson, J., held that this was not such an inducement as to exclude evidence of what the prisoner said. *R. v. Lloyd, 6 Car. & P.* 393. So, a statement made by a person as a witness before a committee of the house of commons, and under compulsory process, was received in evidence by Abbot, C. J., upon an indictment afterwards preferred against the witness for perjury. *R. v. Mercer, 2 Stark.* 366. So, where a prisoner in gaol, on a charge of felony, asked the turnkey of the gaol to put a letter in the post for him, directed to his father, and the turnkey, instead of putting it into the post, sent it to the prosecutor: Garrow, B., held that the letter was admissible in evidence against the prisoner, notwithstanding the manner in which it had been obtained. *R. v. Derrington, 2 Car. & P.* 418.

But where a threat or promise is thus used, it must appear to have been used by some person concerned in apprehending, examining, or prosecuting the prisoner, or by the person to whom the confession is made, to have the effect of preventing such confession from being given in evidence. Thus, where, upon a man being apprehended for larceny, several of his neighbours admonished him to tell the truth and consider his family, and he therefore made a confession to the constable: the judges held this confession to be receivable in evidence, because the inducement to confess was not holden out or sanctioned by any person who had any concern in the business. *R. v. Row, R. & Ry.* 153. Upon the trial of a girl for the murder of a bastard child, it appeared that a woman who was present when the surgeon was attending her, mentioned that

she had advised her to confess, and the girl then made a confession to the surgeon: Parke, J. and Hullock, B., held that the confession was receivable in evidence, because the inducement to confess was holden out by a person who had no authority whatever to do so; if it had been by the constable, prosecutor, or the like, it would have been otherwise. *R. v. Gibbons*, 1 *Car. & P.* 97. And see *R. v. Tyler*, *Id.* 129. But where a married woman was apprehended for felony, and her husband being present told her that if she knew anything about it, to tell the truth: this was holden not to be receivable in evidence, as the inducement, being holden out in the presence of the constable, was the same as if it had been holden out by him. *R. v. Laughner*, 2 *Car. & K.* 225. So, where a girl, being apprehended for the murder of her child, was left by the constable in the custody of a woman, who told her she had better tell the truth, otherwise it would lie upon her, and the man would go free; upon which she made a confession to the woman: Parke and Taunton, JJ., held this confession not receivable, as it was made in consequence of an inducement held out to the prisoner by a person who had her in custody. *R. v. Enoch*, 4 *Car. & P.* 539. And where the committing magistrate told the prisoner, that if he would make a disclosure, he would do all he could for him, and the prisoner afterwards made a disclosure to the turnkey of the gaol: Parke, J., held that it was not receivable in evidence after the promise holden out by the magistrate, more especially as the turnkey had not given any previous caution to the prisoner. *R. v. Cooper*, 5 *Car. & P.* 535.

If, however, after an inducement by threat or promise has been holden out to a prisoner to confess, and, before any confession actually made, the prisoner be undeceived as to the promise or threat, and assured that he has nothing to hope from the one or fear from the other, any confession he makes afterwards will be receivable in evidence. Where a man, committed for murder, was told by a magistrate, that, provided he was not the person who struck the fatal blow, he would use all his endeavours and influence to prevent any ill consequences to him, if he would disclose all he knew of the murder; and the magistrate wrote upon the subject to the secretary of state; but upon learning from him that mercy could not be extended to the prisoner, he informed the prisoner of it; afterwards the prisoner made a confession before the coroner, but he was previously told by him that any confession or admission he should make would be given in evidence against him at the trial, and that no hope or promise of pardon could be held out to him: Littledale, J., held clearly, that this confession was receivable in evidence. *R. v. Cleaves*, 4 *Car. & P.* 221. So, upon the trial of a girl for administering poison, it appeared that she was threatened by her mistress, that, if she did not tell all about it that night, a constable should be sent

for the next morning, to take her before the magistrates; and she made a statement accordingly, which the judge refused to receive in evidence; but it appeared, also, that the constable was actually sent for the next morning, and took her into custody, and that whilst on the way to the magistrates, in his custody, she made another confession to him: Bosanquet, J., held this latter confession to be admissible in evidence, for, at the time the prisoner made it, the inducement was at an end. *R. v. Richards*, 5 Car. & P. 318. So, where the constables had induced a prisoner to confess, by telling him that his companions had "split," and he might as well do so; but afterwards, upon this appearing before the magistrate who took the examination, he informed the prisoner that his confessing would do him no good, but that he would be committed to prison to take his trial: Denman, C.J., held, that a confession by the prisoner to the magistrate, after this caution, was receivable in evidence. *R. v. Hoices*, 6 Car. & P. 404. See stat. 11 & 12 Vict. c. 42, s. 18, *post*, pp. 132, 133.

But even in cases where the confession of a prisoner is not receivable in evidence, on account of it having been obtained by means of some threat or promise, any discovery made in consequence of it may be proved; 2 Hawk. c. 46, s. 38; and in such a case, the counsel for the prosecution is merely allowed to ask the witness, whether, in consequence of something he heard from the prisoner, he found anything, and where, &c., and the witness in answer can only give evidence of the fact of the discovery. In one case, indeed, the judges are reported to have gone further. The case was thus:—the prisoner was indicted for stealing a guinea and two bank notes for 5*l.* each; the prosecutor in his evidence was about to state a confession of the prisoner, but admitting that he had previously told the prisoner that it would be better for him to confess, Chambre, J., who tried the case, would not allow the confession to be given in evidence; but he allowed the prosecutor to prove "that the prisoner brought him a guinea and a 5*l.* bank note, which he gave up to the prosecutor as the guinea and one of the notes that had been stolen from him:" and a majority of the judges (Lord Ellenborough, Mansfield, Macdonald, Heath, Grose, Chambre, and Wood,) held that this evidence was properly receivable. *R. v. Griffin*, R. & Ry. 150. On the very same day, the judges appear to have decided another case, which was thus:—the prisoner was indicted for stealing money, to the amount of 1*l.* 8*s.*; when he was apprehended, the prosecutor went to him, and asked him what he had done with his money which he had taken out of his pack, saying at the same time "that he only wanted his money, and if the prisoner gave him that, he might go to the devil if he pleased;" the prisoner therefore took 1*l.* 6½*d.* out of his pocket, and said it was all that was left of it: a majority of the judges (Macdonald, Chambre, Lawrence, Le

Blanc, and Heath,) held, that this was not receivable in evidence; Wood, Grose, and Mansfield were of a different opinion, Lord Ellenborough *dubitante*. *R. v. Jones, R. & Ry.* 151. There is also another case upon the same subject, decided at a later period; the former cases were decided in 1809, the following case in 1822: the prisoner was indicted for stealing several gowns and other articles; he was induced, by promises of the prosecutor, to confess his guilt, and after that confession he took the officer to a particular house, as the house where he had disposed of the property, and pointed out the person there to whom he had delivered it; that person denied having received it, and the property was never found: the confession was not admitted in evidence, but the taking of the officer to the house above mentioned was, and the prisoner was convicted; Bayley, J., who tried the prisoner, entertaining a doubt whether the latter evidence was properly receivable, submitted the matter to the judges, who held that it was not, and that the conviction therefore was wrong: that the confession was excluded, because being made under the influence of a promise, it could not be relied on; and the act of the prisoner, under the same influence, not being confirmed by the finding of the property, was open to the same objection; the influence which produced a groundless confession, might also produce groundless conduct. *R. v. Jenkins, R. & Ry.* 492. The above case of *R. v. Jones*, however, shows that the finding of the property makes no difference. There is no doubt that if the goods in Jenkins's case had been found at the house, the officer might prove that he found them there in consequence of something he learned from the prisoner; but whether that would also let in evidence of the prisoner's act in accompanying the officer to the house, is another question.

Before a magistrate.] A confession made by a party charged with felony [or misdemeanor], on his examination before a magistrate, or before a secretary of state upon a charge of treason, has always been allowed to be given in evidence against the defendant upon his trial. 2 *Hawk.* c. 46, ss. 31, 32. And by a recent statute, 11 & 12 Vict. c. 42, s. 18, we have seen (*ante*, p. 42), that where a prisoner is brought before a justice of the peace, charged with an indictable offence,—after the examination of the witnesses on the part of the prosecution has been completed, the justice, or one of the justices, by or before whom such examination shall have been so completed, shall read or cause to be read to the accused the depositions taken against him, and shall say to him these words, or words to the like effect: “Having heard the evidence, do you wish to say anything in answer to the charge? You are not obliged to say anything unless you desire to do so, but whatever you say will be taken down in

writing, and may be given in evidence against you on your trial ;” and whatever the prisoner shall then say in answer thereto, shall be taken down in writing, and read over to him, and shall be signed by the said justice or justices, and kept with the depositions of the witnesses, and shall be transmitted with them to the proper officer of the court where the defendant is to be tried ; and afterwards, upon his trial, the same may, if necessary, be given in evidence against him, without further proof thereof, unless it shall be proved that the justice or justices purporting to sign the same, did not in fact sign the same. 11 & 12 Vict. c. 42, s. 18. Such is the humane provision of the English law, to prevent a prisoner from committing himself, by any unadvised admission, which otherwise, in his confusion and agitation arising from the proceedings against him, he might make, without calculating on its consequence. It is in the true spirit of fairness towards the prisoner, which distinguishes the administration of criminal justice in this country, from its administration in any other country in Europe.

The prisoner's statement, when required by the prosecutor for the purpose of being given in evidence before the grand jury or at the trial, is merely produced from among the depositions, and proves itself. *R. v. Sansome*, 19 L. J. 143 m. And as the usual form of such statement recites the charge against the prisoner, and that after examination of the witnesses against him the magistrates addressed to him the caution above mentioned, setting it out in the very words of the statute,—the written statement itself, purporting to be signed by the magistrate, and accompanying the depositions, proves all that recital, as well as what the prisoner said upon the occasion. But if the usual form have not been adopted, then the caution, the prisoner's statement, and the magistrate's signature, must be proved as at common law, (*per Alderson, B., in R. v. Boyd*, 19 Law J. 141,) namely, by the magistrate or his clerk, or by some person who was present at the examination. *R. v. Hearn*, Car. & M. 109. *R. v. Wilshaw*, *Id.* 145.

But although the prisoner be thus cautioned before he makes his statement, yet if his statement amount to a confession, and he were induced to make it by any previous promise of favour or threat, as already mentioned, *ante*, p. 126, it cannot be read in evidence against him,—unless, indeed, before he make the statement, he have been undeceived as to the threat or promise, and told that he has nothing to fear from the one or hope from the other. *See ante*, p. 129. To meet this difficulty, the same section of the statute which directs the above caution to be given, contains also this proviso, “that the said justice or justices, before such accused person shall make any such statement, shall state to him and give

him clearly to understand, that he has nothing to hope from any promise of favour, and nothing to fear from any threat, which may have been holden out to him, to induce him to make any admission or confession of his guilt, but that whatever he shall then say may be given in evidence against him upon his trial, notwithstanding such promise or threat: provided nevertheless, that nothing herein enacted and contained, shall prevent the prosecutor in any case from giving in evidence any admission or confession, or other statement of the person accused or charged, made at any time, which by law would be admissible as evidence against such person." 11 & 12 Vict. c. 42, s. 18. It was at one time attempted to be argued that no confession made after the first caution above mentioned, could be given in evidence against a prisoner, unless the second proviso were also complied with, and the defendant told that he had nothing to hope from any promise of favour, and nothing to fear from any threat which might have been holden out to him to induce him to confess; but the judges in the criminal appeal court, in the case of *R. v. Sansome*, 19 Law J. 143 m., unanimously decided that this was necessary only in cases where such a threat or promise had actually been holden out, in order to undeceive the prisoner in respect of it, as mentioned *ante*, p. 129, and make his confession evidence against him notwithstanding; but that in all other cases, it is sufficient to give the first caution, after which any confession, not induced by threat or promise, may be given in evidence against the prisoner. The case of *R. v. Sansome* was thus:—The prisoner was tried upon an indictment for murder; when he was before the committing magistrate, the ordinary caution, that first mentioned *ante*, p. 131, was read to him, after which he made a statement, amounting to a confession, which was signed by him, and by the committing magistrate, and transmitted with the depositions; at the trial, however, it was objected that the statement could not be given in evidence against the prisoner, as the caution as to the threat or promise had not also been given to him by the magistrate: but the judges, on reference to them, held that this was not necessary: the latter was not a condition precedent to the admissibility of a confession of the prisoner before the committing magistrate, and was necessary only where there had been a previous threat or promise; if given, it has the effect of rendering the confession admissible in evidence, notwithstanding such previous threat or promise; and if not given, the case remained as at common law, and the confession was admissible in evidence, unless the party were influenced by some previous threat or promise to make it. *R. v. Sansome*, 19 Law J. 143 m. So, where after the first of these cautions, the prisoner made a statement, which was taken down, but was not signed by him or by the magis-

trate; he was then remanded, and upon being brought up again, some questions were put to the witnesses by the prisoner's attorney, who then objected that as an addition had been made to the evidence, the prisoner's former statement could not be evidence against him; afterwards at the trial, the same objection being made, the statement was admitted in evidence against the prisoner, and the point reserved for the opinion of the criminal appeal court: and that court afterwards held that the evidence was properly received. *R. v. Bond*, 19 *Law J.* 138 m.

By Presumptions.

A presumption is, where some facts being proved, another follows as a natural or very probable conclusion from them, so as readily to gain assent from the mere probability of its having occurred, without further proof. *Arch. Pl. & Ev. Civ. Act.* 362, 363. The fact thus assented to, is said to be presumed; that is, taken for granted, until the contrary be proved by the opposite party: *stabitur præsumptioni donec probetur in contrarium.* *Co. Lit.* 373. And it is adopted the more readily, in proportion to the difficulty of proving the fact by positive evidence, and to the obvious facility of disproving it, or of proving facts inconsistent with it, if it really never occurred. It is therefore, we have seen (*ante*, pp. 119—122), adopted in proof of intent, of the wilful doing of an act, of malice, and of guilty knowledge, for these can be proved only by the admission of the party, or from his overt acts from which the jury may infer or presume them. It is adopted also in proof of the commission of the offence itself, in the absence of evidence of any person who actually saw it committed, as shall be noticed presently.

Presumptions are of three kinds: *violent presumptions*, where the facts and circumstances proved, *necessarily* attend the fact presumed; *Gilb. Ev.* 157; *probable presumptions*, where the facts and circumstances proved, *usually* attend the fact presumed; 3 *Bl. Com.* 372; and light or rash presumptions, which, however, have no weight or validity at all. *Id. Gilb. Ev.* 157. *Co. Lit.* 6 b. And see *Arch. Pl. & Ev. Civ. Act.* 363, and the cases and other authorities there collected.

Under this head is classed that very usual mode of proving offences, adopted from necessity, called circumstantial evidence. Direct and positive evidence of the commission of offences, cannot in all cases be procured; people do not always commit offences publicly, in the open day, but oftener commit them in secret, or at night; and if circumstantial evidence were excluded by our law, all secret offences might be committed with impunity. Circumstantial or presumptive evidence, therefore,

is allowed in all cases, where direct and positive evidence of the defendant's having committed the offence cannot be procured; and it is often as satisfactory as direct and positive evidence. It is also adopted as confirmatory evidence, even where there is direct and positive evidence of the offence committed, in order to induce the jury to yield a more ready credence to the direct and positive evidence. In larceny, for instance, after proving that the goods were taken or stolen, proof that they were found in the possession of the prisoner shortly afterwards, and that he did not give any satisfactory account of the manner in which he came by them, is deemed good presumptive evidence of the prisoner having stolen them; *see post*, tit. "*Larceny*;" and if to this be added evidence that the goods, when found, were concealed or disguised, or that the prisoner, when charged with the offence, absconded, it will very much strengthen the presumption. On the other hand, if the goods be not found for a considerable time after they were stolen, the presumption is proportionably weakened. And in larceny, even where there is direct and positive evidence of the prisoner's guilt, if at the same time there be any doubt whatever of the jury believing the witnesses, it is usual in practice to add evidence of all circumstances the case furnishes, from which the jury may infer the guilt of the prisoner, and that the witnesses are speaking the truth; as for instance, that the prisoner was seen in the neighbourhood of the place from whence the goods were stolen, shortly before they were missed, or about the time when it is probable they were stolen; that shortly afterwards they were found in his possession, or that he pawned or sold them; that he gave a false name in doing so; that he sold them very much under their value; that he gave a false or unsatisfactory account of the manner in which he came by them;—or the like.

Upon an indictment against any person exercising an office, profession, or employment, for a criminal act done by him as such officer, &c., proof that he acted as such officer, &c., will raise the presumption that he was duly appointed, and his appointment therefore need not be proved. *See 6 T. R. 535 n; 4 T. R. 366, per Buller, J. 1 Stark. 405. Peake, 236.* And as to offences against officers:—By stat. 8 & 9 Vict. c. 87, (for the prevention of smuggling) it is enacted by sect. 132, that if upon any trial a question shall arise whether any person is an officer of the army, navy, or marines, being duly employed for the prevention of smuggling, and on full pay,—or an officer of customs or excise,—evidence of his having acted as such, shall be deemed sufficient, and such person shall not be required to produce his commission or deputation, unless sufficient proof shall be given to the contrary. So in the case of peace officers, justices of the peace, constables, &c., it is sufficient to prove that they acted in those characters, without

producing their appointment; and that even in the case of murder. *Per Buller, J., Berriman v. Wise*, 4 T. R. 368. And the same in other cases, where it becomes a question whether a person acting as a public officer, was so at the time. Therefore, upon an indictment against an officer under government, for malversation in his office, a letter of instructions, signed by three of the lords of the treasury, was allowed to be read in evidence, without producing the commission by which they were appointed; *R. v. Jones*, 2 Camp. 131; for it is a general presumption of law, that a person acting in a public capacity, is duly authorized to do so. *Per Ld. Ellenborough, C. J.*, 3 Camp. 433, 432. For the same reason, upon an indictment for perjury, in an oath taken before a surrogate in the Ecclesiastical Court, the fact of the person who administered the oath, having acted as a surrogate, was holden sufficient evidence of his being so, without producing his appointment. *R. v. Verelst*, 3 Camp. 432.

As to the presumptive proof of intent, the wilful doing of an act, malice, and guilty knowledge, *see ante*, pp. 119—122.

By Proofs.

Best evidences.] Whatever is not confessed, and cannot be presumed, must be proved by direct and positive evidence. This evidence is of two kinds,—written evidence, and the parol testimony of witnesses,—both of which shall be treated of in the next two sections. I shall in this place merely notice the general rule, which is applicable to criminal cases as well as to civil, namely, that the best evidence the nature of the case will admit of, must be produced, if it be possible to be had; but if not possible, then the next best evidence that can be had, shall be allowed. *Arch. Pl. & Ev. Civ. Act.* 372. For if it be found that there is any better evidence existing than that which is produced, the very non-production of it creates a presumption that it would have detected some falsehood, which at present is concealed. 3 *Bl. Com.* 368. *Gilb. Ev.* 16. 1 *Show.* 397. *Carth.* 220. 3 *East*, 192. Within the meaning of this rule, written evidence is better than parol evidence; and, therefore, if a deed or other private written instrument is to be proved, nothing else but the deed or instrument itself shall be admitted in evidence, unless it be proved to have been destroyed or lost, or be in the hands of the opposite party; *Arch. Pl. & Ev. Civ. Act.* 372; but in the case of records and other public instruments which cannot or ought not to be removed, they are proved by examined copies or certificates, as we shall see hereafter. Upon an indictment for the forgery of a written instrument, the forged instrument must be produced, unless it have been destroyed by the defendant, or un-

less it be in his possession, and he refuse to produce it after notice. *See post*, p. 138. But upon an indictment for stealing a written instrument, or destroying a will, or the like, no notice to produce it is necessary, but secondary evidence of the instrument is admissible without it. *R. v. Aickles*, 1 *Leach*, 330.

As to parol evidence, there is no distinction between one kind and another; all kinds are of equal degree in the eye of the law; you cannot object to a fact being proved by one witness, because another could have proved it much better; it may be matter of observation to the jury; but if the witness be competent, it is not matter of legal objection to him.

Secondary evidence.] If the written instrument be destroyed or lost, then upon proof of its destruction, or on proof of search for it in every place where it was likely to be found, without effect, the party will be allowed to give secondary evidence of it; that is to say, he will be allowed to give in evidence a counterpart or examined copy of it, or to give even parol evidence of its contents. *Arch. Pl. & Ev. Civ. Act.* 378. 1 *Arch. N. P.* 21. Where in order to account for the non-production of an indenture of apprenticeship, a witness stated that hearing it was in the possession of the pauper (who was then very ill, and shortly afterwards died), he called upon him to make inquiries about it, and he told him that when the indenture expired, it was given up to him, and he burnt it; it was proved also that inquiry was made of the executrix of the master, who said she knew nothing about it; but it did not appear that any search had been made for it among the papers of the master or of the pauper: the court held this to be sufficient; it was not, perhaps, sufficient as proof of the actual destruction of the indenture by the pauper, but it was sufficient to discharge the party of laches in not making further inquiry. *R. v. Morton*, 4 *M. & S.* 48. And in a case in a note in *Bast's Reports* (*How v. Hall*, 14 *East*, 276 *n*), Lord Ellenborough, C. J., said, "I remember an indictment tried before the late Mr. Justice Buller, against a man, I think, of the name of Spragg, for forging a note, which he afterwards got possession of and swallowed; and parol evidence was permitted to be given of the contents of the note, though no notice to produce it had been given; but then, indeed, it might be said that such a notice would be nugatory, as the thing itself was destroyed." Where the document is lost, the proof of the search for it, must be by persons who actually at one time had the custody of the original, or by the persons legally entitled to the custody of it, *see R. v. Castleton*, 6 *T. R.* 236. *R. v. Piddlehinton*, 3 *B. & A.* 460. *R. v. Stourbridge*, 8 *B & C.* 96, and must be such as to satisfy the court that sufficient diligence has been used in the search. *See R. v. East Farleigh*, 6 *D. & R.* 147.

So, if the deed or other instrument be in the hands of the opposite party, and he refuse, on notice, to produce it at the trial, you may give secondary evidence of its contents. *See infra.*

So, if a witness, served with a *subpoena duces tecum* to produce a deed or other writing, appear at the trial, but refuse to produce the document required of him, for a reason which the judge may deem sufficient,—as if it be a deed, and he claim title under it, *Doe v. Owen*, 8 Car. & P. 110, or if he be an attorney, and claim a lien upon it, *Doe v. Ross*, 7 Mees. & W. 102, *R. v. Hankins*, 2 Car. & K. 823, or object that it is the title deed of his client, *Mills v. Oddy*, 6 Car. & P. 730, *Ditcher v. Kendrick*, 1 Car. & P. 161,—the judge upon application will allow the party to give secondary evidence of its contents. And where a witness, who had been subpoenaed to produce a letter, stated in his examination at the trial, that after action brought he gave it to the opposite party, who said that he wished to give it to his attorney; upon this the attorney was called upon to produce the letter, and not doing so, *Ld. Kenyon* allowed the other party to give parol evidence of its contents. *Leeds v. Cook*, 4 Esp. 256.

Notice to produce.] If you wish to prove a document, which is in the hands of the opposite party, or of his agent or deputy, *Baldney v. Ritchie*, 1 Stark, 338. *Sinclair v. Stephenson*, 2 Bing. 514, 1 Car. & P. 582. *Taplin v. Atty*, 3 Bing. 164, or of his banker, *Partridge v. Coates*, Ry. & M. 156. *Burton v. Payne*, 2 Car. & P. 520, you may give him or his attorney notice to produce it; and if, when called upon at the trial, he refuse to produce it, then, upon proof of the notice, and that the document is in the possession of the party or his agent, &c., (*see Robb v. Starkey*, 2 Car. & K. 143), you may give secondary evidence of its contents. Where, upon a bill of indictment for the forgery of a deed being preferred, the grand jury stated to the judge that they were informed that the deed alleged to be forged was in the possession of the defendant, and asked whether they could return a true bill, if the deed were not produced before them; the judge (*Parke, J.*) told them, that if the deed, from being in the possession of the prisoner, or from any other sufficient cause, could not be produced before them, they might receive secondary evidence of its contents. *R. v. Hunter*, 3 Car. & P. 591. The case was tried at the following assizes, and upon that occasion due notice was given to the prisoner to produce the deed; it was proved that his attorney had given it in evidence in an ejectment, as part of the prisoner's title, and had afterwards received it back; and *Vaughan, B.*, held, that on the prisoner's counsel refusing to produce the deed, this was sufficient to let in secondary evidence of its contents. *R. v. Hunter*, 4 Car.

§ P. 128. Where, upon an indictment for forging a deed, it was proposed to give secondary evidence of it, upon the ground that it was in possession of the prisoner, and that he had notice to produce it; but it appearing that the notice was given since the commencement of the assizes, Parke, J., held, that the notice was not sufficient, as it ought to have been given a reasonable time before the assizes; it was then proved that the prisoner, on an examination on oath upon another occasion as a witness before a magistrate, stated, that he had had the deed in question, but that thinking it of no value he burnt it; the admission of this examination in evidence was objected to, as being on oath, but as the prisoner at the time was not charged with this offence, Parke, J., admitted it, and held that the prosecutor was entitled to give secondary evidence of the deed: the secondary evidence offered was a copy of the deed; but as the person who made this copy said that he had never examined it with the original, Parke, J., said, that under these circumstances there could hardly be a satisfactory conviction; and the prisoner was accordingly acquitted. *R. v. Haworth*, 4 Car. & P. 254.

There are some cases, however, in which a notice to produce is not necessary: first, a notice to produce a notice is not necessary in any case; *see Arch. Pl. & Ev. Civ. Act.* 383; secondly, in larceny of a written instrument, secondary evidence of it may be given at the trial, without giving the prisoner a notice to produce the original; *R. v. Aickles*, 1 Leach, 330; in the same manner as in civil cases, in trover for a written instrument, the nature of the instrument may be proved, without giving notice to produce the original. *Bucher et al. v. Jarratt*, 3 B. & P. 143. *How et al. v. Hall*, 14 East, 274. *Per Gibbs, J., in Scott et al. v. Jones*, 4 Taunt. 868.

The following may be the form of a

Notice to Produce.

Yorkshire Summer assizes, [or, Midsummer sessions for the East Riding of the county of York,] 1852.

The Queen against A. B.

Take notice, that you are hereby required to produce to the court and jury, upon the trial of this indictment [a certain, &c., describing the instrument; or if it be an alleged forgery, say, a certain paper writing, purporting to be, &c.,] and all other letters, books, papers, and writings whatsoever, relating to the matters in question in this prosecution.

Yours, &c.,

G. H., the [prosecutor's attorney.]

To [A. B., the above-named defendant.]

This notice should be served such a reasonable time before the trial, as will allow of the party's searching for the instrument, for the purpose of producing it; *Simms v. Kitchen*, 5 *Esp.* 46. *Houseman v. Roberts*, 5 *Car. & P.* 394. *Hargest v. Fothergill*, *Id.* 303; and in country cases, for the assizes, it ought to be served before the commission day, *R. v. Haworth*, 4 *Car. & P.* 254. *Trist v. Johnson*, 1 *Mo. & R.* 259. *George v. Thompson*, 4 *Dowl.* 656, unless it appear that the party actually has it in the assizes town at the time. Afterwards at the trial, the party giving the notice may call for the instrument or not, at his option.

By Dying Declarations.

In trials for murder or manslaughter, the dying declaration of the deceased, as to the prisoner's guilt, the infliction of the injury, &c., made at a time when he was perfectly aware of his danger, and entertained no hope of his recovery, is receivable in evidence in proof of the indictment,—the consciousness of the near approach of death being deemed equivalent to the sanction of an oath. Therefore, as a foundation for such evidence, expressions or actions of the deceased, indicating the sense he entertained of his danger, *Tinkler's case*, 1 *East*, *P. C.* 354, or circumstances from which the same may be collected, 1 *East*, *P. C.* 354. *John's case*, *Id.* 357, 358, must first be proved, in order that the court may judge whether the deceased, at the time he made the declaration, was in that awful state of certainty as to his approaching dissolution, which the law treats as equivalent to the solemn sanction of an oath. And it is for the court to judge of this, not the jury; for it is the court that has to decide whether the evidence is receivable. *John's case*, *supra*. Where an apothecary, upon being called in to a woman, and seeing she was in a dying state, pressed her to say what she had done, for she could not live twenty-four hours unless proper relief were afforded to her, and she then told him what she had taken and who gave it to her; but at that moment she was a good deal relieved from pain, which the apothecary attributed to mortification, and in fact she died in an hour afterwards: the judges thought that it did not sufficiently appear that she was conscious that she was in a dying state when she made this declaration; on the contrary, she seemed to think that if she told what she had taken, she might have relief and recover; they therefore held that the declaration ought not to be received. *Welbourn's case*, 1 *East*, *P. C.* 358. In a similar case, where a surgeon told the deceased that she would not recover, and she was aware of her danger, but said she hoped he would do what he could for her for the sake of her family: from this expression of hope, Bo-

sanquet, J., held, that a declaration made by her at the time, could not be received in evidence; that to make such a declaration evidence, it must appear that the deceased had the impression on her mind of almost immediate dissolution. *R. v. Crockett*, 4 Car. & P. 544. But if the declaration be made under such an impression, the fact of the party afterwards living for some days, will not affect the admissibility of the evidence; *R. v. Bonner*, 6 Car. & P. 386; and on the other hand, if the deceased had not at the time that impression, his declaration is not evidence, although he may have died in an hour after making it. *Welbourn's case*, *supra*. Where the deceased was a child of only four years old, Parke, J., held her dying declarations not to be evidence, because from her tender age it was impossible she could entertain that idea of a future state, which is necessary to make such a declaration admissible. *R. v. Pike*, 3 Car. & P. 508.

These dying declarations must not be confounded with the depositions taken by a justice of the peace, in writing, upon oath, in the presence of the accused, from a person really in a dying state, and who dies shortly after; for in that case, the deposition is receivable in evidence under stat. 11 & 12 Vict. c. 42, s. 17, as the deposition of a deceased witness, and it is wholly immaterial whether the witness, at the time he made it, was aware of his danger, or entertained any apprehension of death. See *Radbourn's case*, 1 East, P. C. 356.

SECTION II.

Written Evidence.

Acts of parliament.] Public acts of parliament are never proved, as all judges are bound judicially to take notice of them; and therefore, when we see a copy of a public act of parliament, printed by the Queen's printer, used upon a trial, we must consider it, not as evidence, but used merely to aid the judge's recollection. And the same of all local acts, containing a clause, either making them public acts, or directing the judges to notice them judicially. Private acts, or local and personal acts, not containing any such clause, may be proved, either by an examined copy of the inrolment,—or by a printed copy, purporting to be printed by the Queen's printer, or the printers of either house of parliament, without further proof. 8 & 9 Vict. c. 113, s. 3. So the statutes of Ireland, previous to the union, may be proved in the courts in this country, by the copies printed and published by the Queen's printer. 41 G. 3, U. K. c. 90, s. 9.

Other records.] Records of any of the Queen's courts at

Westminster, may be proved by an examined copy, that is to say, by a copy that is sworn to be a true copy by a person who examined it with the original. And where an office copy was thus sworn to be examined with the original, but it appeared to have a number of contractions and abbreviations in it, "pnl este," for personal estate, and the like,—it was holden that it could not be given in evidence as a copy. *R. v. Christian*, *Car. & M.* 388. So, the record of an indictment at the assizes or sessions, may be proved by an examined copy; or the record itself, if in the court, may be produced. And for this purpose the record must be made up; for the indictment itself cannot be given in evidence; *R. v. Smith et al.*, 8 *B. & C.* 341. *R. v. Thring*, *Ry. & M.* 171, 5 *C. & P.* 507; nor can you prove the sentence that has been passed upon a party indicted, in any other manner than by the record or an examined copy of it. *R. v. Bourdon*, 2 *Car. & K.* 366. So, to prove an order of a court of quarter sessions, the record must be made up; and it is then proved by an examined copy, or by the production of the record itself. Where the sessions book was produced in such a case, but the clerk of the peace said he would have made up the record on parchment if it had been bespoke, Parke, J., refused to receive the book as evidence. *R. v. Ward*, 6 *Car. & P.* 366. But, on the other hand, where the entry of the order in the sessions book had a regular caption, and was in the present tense, and in every other respect as a record, and it was proved that no other record ever was made up, the court held that the book was legal evidence of the order. *R. v. Yeovley*, 8 *Law J.* 9 *m.* So, a conviction before a magistrate is proved by an examined copy; see 5 *Car. & P.* 38. 1 *Arch. P. A.* 546, 2 *Id.* 70; or the conviction may be produced. And if it recite the information, such examined copy or original will be evidence of that also. 5 *Car. & P.* 38.

To the above rule, that indictments and convictions must be proved by the record or an examined copy, however, there are the following exceptions:

1. As proof of indictments against a person sentenced to transportation, for being at large before the expiration of his sentence, or against a person for rescuing or attempting to rescue him, it is enacted by stat. 5 *G. 4*, c. 84, s. 24, that the clerk of the court or other officer having the custody of the records of the court where such sentence or order of transportation shall have been passed or made, shall, at the request of any person on His Majesty's behalf, make and give a certificate in writing, signed by him, containing the effect and substance only (omitting the formal part) of every indictment and conviction of such offender, and of the sentence or order for his or her transportation, (not taking for the same more than 6s. 8d.), which certificate shall be sufficient evidence of the conviction

and sentence or order for the transportation of such offender ; and every such certificate, if made by the clerk or officer of any court in Great Britain, shall be received in evidence, upon proof of the signature and official character of the person signing the same ; and every such certificate, if made by the clerk or officer of any court out of Great Britain, shall be received in evidence, if verified by the seal of the court, or by the signature of the judge or one of the judges of the court, without further proof. *See R. v. Jones*, 2 Car. & K. 524.

2. As proof of a former conviction, upon an indictment for a subsequent felony, it is enacted by stat. 7 & 8 G. 4, c. 28, s. 11, that a certificate containing the substance and effect only (omitting the formal part) of the indictment and conviction for the previous felony, purporting to be signed by the clerk of the court or other officer having the custody of the records of the court where the offender was first convicted, or by the deputy of such clerk or officer (for which certificate a fee of 6s. 8d. and no more shall be demanded or taken), shall upon proof of the identity of the person of the offender, be sufficient evidence of the first conviction, without proof of the signature or official character of the person appearing to have signed the same. Where the certificate under the statute stated that the prisoner had been indicted and convicted, but did not state the judgment, Cresswell, J., held it to be insufficient. *R. v. Ackroyd et al.*, 1 Car. & K. 158.

3. As proof of a previous acquittal or conviction, it is enacted by stat. 14 & 15 Vict. c. 99, s. 13, that whenever, in any proceeding whatever, it may be necessary to prove the trial and conviction or acquittal of any person charged with any indictable offence, it shall not be necessary to produce the record of the conviction or acquittal of such person, or a copy thereof, but it shall be sufficient that it be certified or purport to be certified under the hand of the clerk of the court or other officer having the custody of the records of the court where such conviction or acquittal took place, or by the deputy of such clerk or other officer, that the paper produced is a copy of the record of the indictment, trial, conviction, and judgment, or acquittal, as the case may be, omitting the formal parts thereof. It seems therefore that the record for this purpose must be made up, although the formal parts need not be included in the certificate.

Matters quasi of record.] Bill, answer, depositions, and decree in a court of equity, are proved by examined copies. *Gilb. Ev.* 49, 50, 56. So, libel, answer, depositions and sentence in the ecclesiastical courts, are proved by examined copies. *Gilb. Ev.* 66, 67. And the same as to proceedings in the Admiralty court. *Com. Dig. Evidence*, C. 1.

As to evidence of proceedings in the county courts : by stat. 9

& 10 Vict. c. 95, s. 111, the entries in the clerk's book, or a copy thereof bearing the seal of the court, and purporting to be signed and certified as a true copy by the clerk of the court, shall at all times be admitted in all courts and places whatsoever, as evidence of such entries and of the proceedings referred to by the same, and of the regularity of such proceedings, without further proof.

The proceedings of other inferior courts, such as the court baron, &c., are usually proved, by producing the books in which they are entered, and proving them by the clerk of the court; or, it seems, they may be proved by examined copies. *See Gilb. Ev. 74. 20. Com. Dig. Evidence, C. 1.*

As to judgments, &c., in foreign courts:—By stat. 14 & 15. Vict. c. 99, s. 7, all judgments, decrees, orders, and other judicial proceedings of any court of justice in any foreign state or in any British colony, and all affidavits, pleadings, and other legal documents filed or deposited in any such court, may be proved in any court of justice, or before any person having by law or by consent of parties authority to hear, receive, and examine evidence,—either by examined copies, or by copies purporting either to be sealed with the seal of the foreign or colonial court to which the original document belongs, or, in the event of such court having no seal, to be signed by the judge, or, if there be more than one judge, by any one of the judges, of the said court, and such judge shall attach to his signature a statement in writing on the said copy that the court whereof he is a judge has no seal; which copies shall be admitted in evidence, without any proof of the seal or signature, or of the judicial character, of the person appearing have made such signature and statement.

As to documents signed by the judges in this country:—by stat. 8 & 9 Vict. c. 113, s. 2, all courts, judges, justices, masters in chancery, masters of courts, commissioners judicially acting, and other judicial officers, shall henceforth take judicial notice of the signature of any of the equity or common law judges of the superior courts at Westminster, provided such signature be attached or appended to any decree, order, certificate, or other judicial or official document.

All copies of the journals of either house of parliament, purporting to be printed by the printers of the crown, or by the printers to either house of parliament, shall be admitted as evidence thereof, by all courts, judges, justices, and others, without any proof being given that such copies were so printed. 8 & 9 Vict. c. 113, s. 3.

As to proceedings in the court of bankruptcy:—by stat. 12 & 13 Vict. c. 106, s. 236, any fiat, petition for adjudication of bankruptcy, petition for arrangement between a debtor and his creditors, assignment, appointment of assignees, certificate, deposition, or other proceeding or order in bankruptcy, or

under any such petition for arrangement, appearing to be sealed with the seal of the court,—or any writing purporting to be a copy of any such document and purporting to be so sealed,—shall at all times and on behalf of all persons, and whether for the purposes of this Act or otherwise, be admitted in all courts whatever as evidence of such documents respectively, and of such proceedings and orders having respectively taken place or been made, and be deemed respectively records of the court, without any other proof thereof. And by sect. 237, all courts, judges, justices, and persons judicially acting, and other officers, shall take judicial notice of the signature of any commissioner or registrar of the court, and of the seal of the court, subscribed or attached to any judicial or official proceeding or document to be made or signed under the provisions of this Act.

Proceedings in the insolvent court (petition, schedule, order of adjudication, &c.) may be proved by an office copy, purporting to be signed by the officer in whose custody the proceedings are, and to be sealed with the seal of the court, without other proof. 1 & 2 Vict. c. 110, s. 105.

Other Public Documents.] Inquisitions may be proved by examined copies, or the originals may be produced. See *Arch. Pl. & Ev. Civ. Act.* 408, 409.

The *Gazette*, printed and published by the Queen's printer, is evidence of all acts of state. 5 T. R. 436.

Royal proclamations, purporting to be printed by the printers to the crown, or by the printers to either house of parliament, shall be admitted as evidence thereof by all courts, judges, justices, and others, without any proof being given that such copies were so printed. 8 & 9 Vict. c. 113, s. 3.

So, the articles of war may be proved by the copy printed and published by the Queen's printer. 5 T. R. 442, 446. See 4 B. & C. 304.

As to the rules of the poor law commissioners:—by stat. 7 & 8 Vict. c. 101, s. 71, a copy of any rule, order, or regulation made by the said commissioners, printed by the Queen's printer, shall, after the lapse of fourteen days from the date thereof, be received in evidence, and judicially taken notice of, and shall, until the contrary be shown, be deemed sufficient proof that such order was duly made, and is in force.

Registers of baptisms, marriages, and burials, may be proved by the register itself, or by an examined copy of it. *Gill. Ev.* 72.

As to ships' registers:—by stat. 14 & 15 Vict. c. 99, s. 12, every register of a vessel kept under any of the Acts relating to the registry of British vessels, may be proved in any court of justice, or before any person having by law or by consent of parties authority to hear, receive, and examine evidence,—

either by the production of the original,—or by an examined copy thereof,—or by a copy thereof purporting to be certified under the hand of the person having the charge of the original, and which person is hereby required to furnish such certified copy to any person applying at a reasonable time for the same, upon payment of the sum of one shilling; and every such register or copy,—and also every certificate of registry, granted under any of the acts relating to the registry of British vessels, and purporting to be signed as required by law,—shall be received in evidence in any court of justice, &c., as *prima facie* proof of all the matters contained or recited in such register, and of all the matters contained or recited in or endorsed on such certificate of registry, respectively.

As to proceedings of corporations or public companies:—by stat. 8 & 9 Vict. c. 113, s. 1, after reciting that it is provided by many statutes that various certificates, official and public documents, documents and proceedings of corporations and of joint stock and other companies, and certified copies of documents, bye-laws, entries in registers and other books, shall be receivable in evidence of certain particulars in courts of justice, provided they be respectively authenticated in the manner prescribed by such statutes; and that the beneficial effect of these provisions has been found by experience to be greatly diminished by the difficulty of proving that the said documents are genuine; and that it is expedient to facilitate the admission in evidence of such and the like documents:—it is enacted, that whenever by any Act now in force or hereafter to be in force, any certificate, official or public document, or document or proceeding of any corporation or joint stock or other company, or any certified copy of any document, bye-law, entry in any register or other book, or of any other proceeding, shall be receivable in evidence of any particular in any court of justice, or before any legal tribunal, or either house of parliament, or any committee of either house, or in any judicial proceeding, the same shall respectively be admitted in evidence, provided they respectively purport to be sealed or impressed with a stamp, or sealed and signed, or signed alone, as required, or impressed with a stamp and signed, as directed by the respective Acts made or to be hereafter made, without any proof of the seal or stamp, where a seal or stamp is necessary, or of the signature or of the official character of the person appearing to have signed the same, and without any further proof thereof, in every case in which the original record could have been received in evidence.

And by stat. 14 & 15 Vict. c. 99, s. 10, every document, which by any law now in force or hereafter to be in force is or shall be admissible in evidence of any particular in any court of justice in Ireland, without proof of the seal or stamp or signature authenticating the same, or of the judicial or official

character of the person appearing to have signed the same,—shall be admitted in evidence to the same extent, and for the same purposes, in any court of justice in England or Wales, or before any person having in England or Wales by law or by consent of parties, authority to hear, receive, and examine evidence,—without proof of the seal or stamp or signature authenticating the same, or of the judicial or official character of the person appearing to have signed the same.

And lastly, the entries in corporation books, and in the books of public offices and companies, such as the books of the Custom House, Bank, East India Company, South Sea Company, and the like, relating to matters public and general, may be proved by examined copies. 1 *Str.* 93. 307. 2 *Id.* 954. 1005. *Hardw.* 128. 2 *Ld. Raym.* 851. 2 *Doug.* 593 n. 3. *Peake*, 43. 4 *Taunt.* 787. And this is now fully confirmed by stat. 14 & 15 Vict. c. 99, s. 14, by which it is enacted that whenever any book or other document is of such a public nature, as to be admissible in evidence on its mere production from the proper custody, and no statute exists which renders its contents provable by means of a copy,—any copy thereof or extract therefrom shall be admissible in evidence in any court of justice, or before any person now or hereafter having by law or by consent of parties authority to hear, receive, and examine evidence,—provided it be proved to be an examined copy or extract,—or provided it purport to be signed and certified as a true copy or extract by the officer to whose custody the original is intrusted, and which officer is hereby required to furnish such certified copy or extract to any person applying at a reasonable time for the same, upon payment of a reasonable sum for the same, not exceeding fourpence for every folio of ninety words.

Depositions of witnesses deceased or unable to travel.] By stat. 11 & 12 Vict. c. 42, s. 17, after directing justices to take the statement on oath or affirmation of the witnesses against a person charged before them with an indictable offence, as mentioned *ante*, p. 35,—it is enacted, that if afterwards upon the trial of the person accused, it shall be proved, by the oath or affirmation of any credible witness, “that any person whose deposition shall have been so taken as aforesaid, is dead, or so ill as not to be able to travel,—and if also it be proved that such deposition was taken in the presence of the person so accused, and that he or his counsel or attorney had a full opportunity of cross-examining the witness,—then, if such deposition purport to be signed by the justice, by or before whom the same purports to have been taken, it shall be lawful to read such deposition as evidence in such prosecution, without further proof thereof, unless it shall be proved that such deposition was not in fact signed by the justice purporting to sign

the same." And it may be read before the grand jury, for the purpose of finding the bill, as well as before the petty jury at the trial. *R. v. Clements*, 20 *Law J.* 193 *m.*

The statutes relating to the examination of witnesses against a prisoner before a justice of the peace, previously in force, (1 & 2 *Ph. & M. c.* 13. 2 & 3 *Ph. & M. c.* 10, and 7 *Geo.* 4, c. 64,) contained no such enactment as the above; and yet it was determined in many cases, and well recognized as a rule of the common law, that in all cases of examinations of witnesses in cases of felony under those statutes, in the presence of the accused, and where he had the opportunity to cross-examine them, the deposition of a witness might be read against the accused upon his trial, if the witness were then dead, 2 *Hawk. c.* 46, s. 15. *R. v. Smith*, *R. & Ry.* 339. *R. v. Osborne*, 8 *Car. & P.* 113, or bedridden, and not likely to be ever able to attend at the assizes, *R. v. Wilshaw*, *Car. & M.* 145, or unable to travel, 2 *Hawk. c.* 46, s. 15, or had become insane, *R. v. Marshall et al.*, *Car. & M.* 147, or was kept out of the way by or on behalf of the prisoner. 2 *Hawk. c.* 46, s. 15. *R. v. Gutteridges et al.*, *Car. & P.* 471, *per Parke, B.* And it is probable, that although the cases of death and inability to travel from illness, alone, are expressly stated in this statute, as those in which the deposition of a witness may be read against a prisoner on his trial, it may be holden that such depositions may also be read in evidence, if the witness be bedridden, though otherwise not in ill health, or if he have become insane, or if he be kept out of the way by the prisoner or by some person on his behalf, at the time of the trial.

Where an objection was made to the admission of a deposition in evidence at the trial, because the caption of it stated no offence in law, it merely stating that the prisoner was charged with obtaining money and other valuable security for money from Mary Rowe, not stating by false pretences, &c. : the judges held that there was nothing in the objection; it was not necessary that there should be a heading or caption to the deposition, to render it admissible in evidence, it was sufficient that it appeared to relate to the charge on which the prisoner was tried. *R. v. Langbridge*, 2 *Car. & K.* 975.

Deeds and other private written instruments.] Deeds, and all other instruments of a private nature, must be proved by the attesting witness, if there be one; or if there be no attesting witness, then by proof of the party's handwriting. *Gilb. Ev.* 99. 7 *T. R.* 266. *Peake*, 198. But where a deed or other writing is thirty years old, it proves itself. *Bul. N. P.* 255. *Gilb. Ev.* 94. So, if the attesting witness be dead, or have become insane or blind, or be abroad out of the reach of the process of the court, or if after a *bond fide*, serious,

and diligent inquiry he cannot be found : in those cases the instrument may be proved, by proving the witness's handwriting. *Arch. Pl. & Ev. Civ. Act.* 421—423.

The handwriting may be proved by any person who has seen the party write, or who knows his handwriting from having corresponded with him, particularly if he have acted upon the letters he received from him. *Arch. Pl. & Ev. Civ. Act.* 423, 424. But it cannot be proved by comparing it with other writing of the party. *Id.* 424.

In larceny of bills of exchange or other valuable securities requiring a stamp, or upon an indictment for obtaining them by false pretences, if it appear in evidence that the bill was not duly stamped, the defendant will be acquitted ; for in that case it is not a valuable security within stat. 7 & 8 G. 4, c. 29, s. 5. Therefore where a man was indicted for obtaining an order for the payment of 2*l.*, by false pretences, and the order appeared to be an unstamped cheque upon a banker, which from the manner in which it was drawn, required a stamp, the judges held that it was not a valuable security within the meaning of the Act. *R. v. Yates, Ry. & M.* 170. Perhaps a distinction in this respect might be made between those instruments, which the commissioners of land revenue may order to be stamped on payment of a penalty, and those which they have no authority to stamp after execution. But this point has not as yet been decided. In forgery, however, it is immaterial whether the forged instrument be stamped or not, although the instrument, if genuine, would require a stamp. *R. v. Hawkwood.* 2 *T. R.* 606.

SECTION III.

Parol Evidence.

In all cases where a fact need not be proved by a record or certificate, or by deed or other written evidence (*see ante*, p. 136), it may be proved by the parol testimony of witnesses. I shall now consider the doctrine of parol testimony, shortly, under the following heads :

1. *Who may be Witnesses.*
2. *Number of Witnesses required.*
3. *Witnesses, how compelled to attend.*
4. *Witnesses' Expenses.*

1. *Who may be Witnesses.*

Quakers, &c.] Quakers may now be witnesses in criminal cases, and may make an affirmation instead of an oath ; 9 G. 4, c. 32 ; and indeed they may now make an affirmation instead

of an oath, in all cases. 3 & 4 W. 4, c. 49. So may Moravians. 9 G. 4, c. 32. 3 & 4 W. 4, c. 49. So may that class of dissenters called Separatists. 3 & 4 W. 4, c. 82.

The form of the affirmation of a Quaker or Moravian, is thus: "*I, A. B., being one of the people called Quakers*" [or "*one of the persuasion of the people called Quakers,*" or "*one of the United Brethren called Moravians,*" [as the case may be], "*do solemnly, sincerely, and truly declare and affirm that,*" &c.

The affirmation of the Separatists is thus: "*I, A. B. do, in the presence of Almighty God, solemnly, sincerely and truly affirm and declare that I am a member of the religious sect called Separatists, and that the taking of any oath is contrary to my religious belief, as well as essentially opposed to the tenets of that sect; and I do also, in the same solemn manner, affirm and declare that,*" &c.

Jews, Turks, &c.] Jews may be witnesses, and are sworn upon the Old Testament, or rather, upon the five books of Moses.

Turks and Mahomedans of all descriptions, may be witnesses, and are sworn upon the Koran.

So, Moors, Gentooes, Chinese, and in fact every person who believes in a God, and in a future state of rewards and punishments, and in the moral obligation of the oath he is about to take, may be witnesses, *Bul. N. P.* 292. *Arch. Pl. & Ex. Civ. Act.* 440, each to be sworn in such form as he deems obligatory upon his conscience. But a person who has no religious belief, which he deems binding on his conscience to speak the truth upon oath, cannot be a witness. *Bul. N. P.* 292.

Infants.] Infants of the age of fourteen may be witnesses; and under that age, if they appear to have competent discretion. 2 *Hale*, 273. Where they are very young, it is usual for the judge to question them as to their belief in God, their belief as to the punishment hereafter for swearing falsely, and the like, before he allows them to be sworn. See *R. v. Williams*, 7 *Car. & P.* 320.

Deaf and dumb persons.] Deaf and dumb persons may be witnesses, 2 *Hauck.* c. 46, s. 163, if any person can be found who can interpret their signs to the court and jury upon oath, *R. v. Pollock*, *MS.* 1814. *R. v. Ruston*, 1 *Leach*, 408, or if they can write and read writing, so that the questions and answers may be conveyed in writing.

Lunatics.] Lunatics may be witnesses in their lucid intervals; *Com. Dig. Testm. A.* 1; idiots or insane persons cannot. *Co. Lit.* 6 b. And when a lunatic is tendered as a wit-

ness, it is for the judge to examine and ascertain whether he is of competent understanding to give evidence, and is aware of the nature and obligation of an oath ; if satisfied that he is, the judge should allow him to be sworn and examined. *R. v. Hill*, 20 *Law J.* 222 m.

Judge or juror.] A judge may be a witness. And it is said that he may be so, even although he is the judge to try the cause ; 2 *Hawk. c.* 46, s. 83 ; but this at present never occurs in practice. A juror, however, may be a witness, either for or against the prisoner, and must be sworn as such ; *Id.* ; but it is right that he should inform the court of his having evidence to give in the case, before he is sworn as a juror, and indeed to decline acting as a juror in the case, if the court will permit him.

Prosecutor.] The prosecutor in criminal cases may be, and generally is, a witness, either for the prosecution or for the defendant ; even in cases of forgery, the person whose name is forged may now be a witness to sustain the prosecution. 9 *G.* 4, c. 32, s. 2. There were some cases formerly, in which the prosecutor was not allowed to be a witness, on account of the interest he had in the result of the prosecution ;—in a prosecution for forcible entry on stat. 8 H. 6, c. 9, s. 3, or 21 Jac. 1, c. 15, he was not allowed to be a witness, for he was entitled to restitution if the defendant should be convicted ; *R. v. Williams*, 9 *B. & C.* 549 ; or in cases where the punishment was by fine only, and the prosecutor was to have the whole or a part of it, he could not be a witness ; see *R. v. Blackmore*, 1 *Esp.* 95. *R. v. Cole*, *Id.* 217 ;—but now, interest in the event of the prosecution, no longer renders a witness incompetent, by stat. 6 & 7 Vict. c. 85, s. 1, which I am now about to notice more fully.

Persons interested in the event.] By stat. 6 & 7 Vict. c. 85, s. 1, no person, offered as a witness, shall be excluded, by reason of incapacity from interest, from giving evidence, either in person or by deposition according to the practice of the court, on the trial of any issue joined, or of any matter or question or on any inquiry arising in any suit, action, or proceeding, civil or criminal, in any court, or before any judge, jury, sheriff, coroner, magistrate, officer or person having, by law or by the consent of the parties, authority to hear, receive, and examine evidence ; but that every person so offered may and shall be admitted to give evidence on oath, or solemn affirmation in those cases wherein affirmation is by law receivable, notwithstanding that such persons may or shall have interest in the matter in question, or in the event of the trial of any issue, matter, question, or inquiry, or of the suit, action, or proceeding, in which he is offered as a witness. This

Act contained some exceptions, namely,—parties to the suit, action, or proceeding, named in the record,—lessor of plaintiff in ejectment,—tenant of the premises sought to be recovered in ejectment,—the landlord or other person in whose right a defendant in replevin makes cognizance,—persons in whose immediate and individual behalf any action is brought or defended, either wholly or in part,—and the husband or wife of any such person;—all which exceptions, however, have recently been repealed by stat. 14 & 15 Vict. c. 99, s. 1.

By stat. 14 & 15 Vict. c. 99, s. 2, also, parties to suits, actions, or other proceedings in courts of justice, are made competent witnesses, and compellable to give evidence for or against each other. But, by sect. 3, nothing herein contained shall render any person, who, in any criminal proceeding is charged with the commission of any indictable offence, or any offence punishable on summary conviction, competent or compellable to give evidence for or against himself or herself,—or shall render any person compellable to answer any question tending to criminate himself or herself,—or shall in any criminal proceeding render any husband competent or compellable to give evidence for or against his wife, or any wife competent or compellable to give evidence for or against her husband. *Vide infra.*

Inhabitants.] The rated inhabitants of parishes were in many instances holden to be incompetent as witnesses for their parish, in any proceedings by or against it, on the ground of interest. But by stat. 54 G. 3, c. 170, s. 9, they were rendered competent in all matters relating to rates, orders of removal, settlements, and bastards; and by stat. 1 Ann, stat. 1, c. 18, s. 13, the inhabitants of a county, riding, or division, were rendered competent, in prosecutions for the non-repair of bridges, and the roads at the ends of them; and by stat. 27 G. 3, c. 29, s. 1, the inhabitants of a parish, township, or place were rendered competent witnesses to prove any offence to have been committed within their parish, &c., where the penalty was applicable to the poor of such parish, or otherwise in aid or exoneration of such parish, &c. But the stat. 6 & 7 Vict. c. 85, already mentioned (*supra*) has the effect of rendering inhabitants competent witnesses in all cases for their parish, &c., although by stat. 14 & 15 Vict. c. 99, s. 3 (*supra*), or at least by the equity of that statute, not competent or compellable to give evidence against it, where the inhabitants generally are indicted.

Husband and wife.] A wife cannot be examined as a witness for or against her husband, or a husband as a witness for or against his wife, *Gilb. Ev.* 133, 134. *Bac. Abr. Evidence*, A. 1. 2 *Hawk. c.* 46, s. 70, 71. *See R. v. Sills et al.*, 1.

Car. & K. 494, except in the case of a personal injury committed by one upon the other, in which case (from necessity) the one may be a witness against the other. *R. v. Azyre*, 1 *Str.* 633. 2 *Hawk. c.* 46, *s.* 77. *Lord Audley's case*, 1 *St. Tr.* 388. And this exception is not affected by the general expression in the 3rd section of stat. 14 & 15 *Vict. c.* 99, above-mentioned, namely, that nothing in that section shall render a husband competent or compellable to give evidence against his wife, or a wife against her husband,—as that section merely has relation to the other provisions of the same Act. But in no other cases of relationship are the parties incompetent to give evidence for or against each other: a father may be a witness for or against his son, a son for or against his father, a brother for or against his brother. 2 *Hale*, 276.

Attorney.] An attorney cannot disclose any confidential communication made to him, as attorney, by his client, *Gilb. Ev.* 136. *Arch. Pl. & Ev. Civ. Act.* 474. 1 *Arch. Pr.* 75. *Hawk. c.* 46, *ss.* 84—86, whether made with reference to any suit then depending or in contemplation, or not. *Doe v. Harris*, 5 *Car. & P.* 592. And this is the privilege, not of the attorney, but of the client, and the court will not permit him to make the disclosure. 4 *T. R.* 753. The same rule applies to barristers; but not to medical men, or other persons. *Per Buller, J.* 4 *T. R.* 760. 2 *Hawk. c.* 46, *s.* 92. An attorney also cannot be compelled to produce the deeds or documents of his client; see *Bate v. Kinsey*, 1 *Cr. M. & R.* 38. *Davies v. Waters*, 1 *Dowl. N. C.* 651, 11 *Law J.* 214 *ex. R. v. Hankins*, 2 *Car. & K.* 823; but he may be subpoenaed to produce them, and if he refuse to do so, secondary evidence may be given of their contents. *Coates et al. v. Birch*, 2 *Q. B.* 252. If however he be the attesting witness to a deed of his client, his privilege does not exempt him from proving its execution. *Doe d. Avery v. Roe*, 6 *Dowl.* 518. 2 *Hawk. c.* 46, *ss.* 87, 89.

One of two defendants.] If one of two defendants plead guilty, and the other be tried, the defendant who pleaded guilty, before sentence is passed upon him, may be a witness for his companion, *R. v. George et al.*, *Car. & M.* 111, or against him, *R. v. Hinks et al.*, 2 *Car. & K.* 462. 1 *Den. C. C.* 84. And now, by stat. 6 & 7 *Vict. c.* 85, *s.* 1, he may be a witness, although judgment have been pronounced upon him. *Vide infra*. Also, upon an indictment against two or more, the prosecutor may apply to have one of the defendants acquitted, in order to make him a witness for the prosecution; and the other defendants cannot object to it; *R. v. Rowland et al.*, *Ry. & M., N. P. C.* 401; or, if on the trial there be

no evidence against him, he may be acquitted, and give evidence for the others. 2 *Hawk. c. 46, s. 98.*

Accomplice.] An accomplice may give evidence against those jointly guilty with him. 2 *Hawk. c. 46, ss. 94, 95. Vide supra.* But although in point of law they may be found guilty on his testimony alone, 2 *Hawk. c. 46, s. 98. R. v. Jones, 2 Camp. 132, 131. R. v. Hastings, 7 Car. & P. 152,* yet in practice it is not usual to convict, on the testimony of an accomplice, or of the wife of an accomplice, *R. v. Neal et al., 7 Car. & P. 168,* unless his or her story be confirmed in some material part, by the testimony of other credible witnesses. See *R. v. Bernard et al., 1 Car. & P. 88. 2 Hawk. c. 46, s. 96.* And this confirmatory testimony must not merely relate to the manner in which the offence was committed, for that proves only that the accomplice was present at the commission of it; *R. v. Wilkes, 7 Car. & P. 272. R. v. Webb, 6 Id. 595. R. v. Farler, 8 Id. 106. R. v. Dyke, 8 Id. 261;* but it must be as to some facts or circumstances, which tend to connect the accused with the offence, or to connect the accused and the accomplice together. *R. v. Addis, 6 Car. & P. 388.* And where A. was indicted as principal, and B. as receiver, and A. pleaded guilty, and an accomplice was called to give evidence against B., it was holden that evidence confirming some part of the accomplice's story as to A., was no confirmation of his evidence as it affected B. *R. v. Moores et al., 7 Car. & P. 270.* But where two are on their trial as principals, and an accomplice is admitted to give evidence against them, and his evidence is confirmed as to one of them, but not as to the other, this will warrant the jury in finding both defendants guilty. *R. v. Dauber et al., 3 Stark. 34.* If however two or more accomplices be examined, the evidence of one is not deemed confirmed by that of the other, but the evidence of both requires to be confirmed by other testimony. *R. v. Noakes, 5 Car. & P. 326.* However, since the passing of stat. 6 & 7 Vict. c. 85, which shall be presently mentioned, where the unconfirmed testimony of an accomplice is the only evidence against a prisoner, the judge will not withdraw the case on that account from the consideration of the jury; he will leave it to them, however, with a recommendation not to act upon it. *R. v. Skiller, 9 Shaw's J. P. 314.* It may sometimes also be a question whether the witness was in fact an accomplice of the defendant, so as to require confirmation; it has been holden, for instance, that a person employed by government, to mix with conspirators, and detect their designs, is not an accomplice, and does not require to have his testimony confirmed. *R. v. Mullens, 12 Shaw's J. P. 776, and see R. v. Dowling, Id. 678.*

Persons convicted.] By stat. 6 & 7 Vict. c. 85, s. 1, no person offered as a witness shall be excluded, by reason of incapacity from crime, from giving evidence, either in person or by deposition, according to the practice of the court, on the trial of any issue joined, or of any matter or question or on any inquiry arising in any suit, action, or proceeding, civil or criminal, in any court, or before any judge, jury, sheriff, coroner, magistrate, officer, or person having by law, or by the consent of parties, authority to hear, receive, and examine evidence; but that every person so offered, may and shall be admitted to give evidence on oath, or solemn affirmation in those cases where an affirmation is receivable, notwithstanding that such person may have been previously convicted of any crime or offence. This Act contained a proviso, that it should not extend to render competent any party to any suit, action, or proceeding, individually named in the record; but that proviso is repealed by stat. 14 & 15 Vict. c. 99, s. 1; so that now a party convicted, may be a witness against those with whom he is jointly indicted, *see R. v. Hinks, ante*, p. 153, as well as in other cases; his conviction merely affects his credit.

Examination on the *voire dire*.] In order to ascertain whether a witness is competent or not, the counsel for the opposite party is entitled to examine him upon the subject, before he is examined in chief. This is termed an examination on the *voire dire* (*veritatem dicere*). But if the incompetency appear at any period during the trial, the judge will give the party the benefit of it, by striking out the evidence of the witness. It is a general rule, that where the incompetency of a witness is impeached upon the *voire dire*, it may be restored upon his cross-examination by the party calling him, without producing or proving any written document for that purpose; but if the competency be impeached by other evidence, that evidence must be met and answered by documentary or other evidence, as in other cases. *Per Lord Kenyon, C.J., Botham v. Swingle, 1 Esp. 164, and see Id. 162. See 1 Arch. N. P. 33, 34.*

2. Number of Witnesses required.

In treason and misprision of treason, the offence must be proved by two witnesses, either both to the same overt act, or one witness to one overt act and another to another overt act of the same treason; 7 & 8 W. 3, c. 3, ss. 2, 3; except where an attempt to injure the person of the Queen is laid as an overt act, in which case one witness is sufficient, for by stat. 5 & 6 Vict. c. 51, s. 1, the trial in such a case must be in the same manner as in murder.

In perjury, there must be two witnesses to the same assign-

ment. 2 *Hawk. c. 46, s. 10*. But the taking of the oath, and the facts deposed to, may be proved by one witness. *Id.*

In all other cases, there is no certain number of witnesses required. 2 *Hawk. c. 46, s. 3. Id. c. 25, s. 129*.

3. *Witnesses how compelled to attend.*

We have seen (*ante*, p. 47), that the witnesses for the prosecution, who attend before the magistrate at the time the prisoner is committed, are bound over by recognizance to prosecute, or to prosecute and give evidence, or to give evidence, as the case may be; and for non-attendance, their recognizance may be estreated. All other witnesses, on the one side and the other, may be compelled, if necessary, to attend, by *subpœna* issued from the crown office, or issued by the clerk of assize or clerk of the peace: if it issue from the crown office, the court of Queen's Bench may punish the party by attachment, for non-attendance. If the witness be in custody on civil process, he can only be brought up by writ of *habeas corpus*. See as to the mode of suing out this latter writ, *Arch. Pr. Cr. Off.* 348.

4. *Witnesses' Expenses.*

In a criminal case, a witness cannot refuse to give his testimony, until his expenses have been paid to him, even although subpœnaed on the part of the defendant; *R. v. James et al.*, 1 *Car. & P.* 322; and the indictment having been removed by *certiorari*, and the trial being of course in the nisi prius court at the assizes, makes no difference. *Id.* But at the assizes or sessions, if the court upon application grant the prosecutor his expenses, this includes the expenses of the witnesses who have attended, either upon recognizance or *subpœna*, and the amount is immediately handed over to them.

CHAPTER V.

The Trial, &c.

The matters I have to discuss in this chapter, I propose to arrange under the following heads:

- Section 1. *The Jurors.*
 2. *The Trial.*
 3. *The Verdict.*
 4. *The Judgment.*
 5. *Appeal to the Criminal Appeal Court.*
 6. *Writ of Error.*
 7. *Execution.*

SECTION I.

The Jurors.

Qualification.] Every man, between the ages of twenty-one and sixty, residing in any county in England, who shall have in his own name or in trust for him, within the same county, 10*l.* by the year above reprises in lands or tenements, whether of freehold, copyhold, or customary tenure, or of ancient demesne, or in rents issuing out of any such lands or tenements, or in such lands, tenements, and rents taken together, in fee simple, fee tail, or for the life of himself or some other person;—or who shall have within the same county 20*l.* above reprises in lands or tenements, held by lease for an absolute term of twenty-one years or more, or for any term of years determinable on any life or lives;—or who, being a householder, shall be rated or assessed to the poor rate, in Middlesex, on a value not less than 30*l.*, or in any other county on a value not less than 20*l.*;—or who shall occupy a house containing not less than fifteen windows:—shall be qualified and liable to serve on juries for the trial of all issues joined in any of the Queen's courts of record at Westminster, and in the superior courts, both civil and criminal, of the three counties palatine, and in all courts of assize, nisi prius, oyer and terminer and gaol delivery, such issues being respectively triable in the county in which every man so qualified respectively shall reside, and shall also be qualified and liable to serve on grand juries in courts of sessions of the peace, and on petty juries for the trial of all issues joined in such courts of sessions of the peace, and triable in the county, riding, or division, in which every man so qualified respectively shall reside. 6 *G.* 4, c. 50, s. 1. In Wales, the qualification is three-fifths of the qualifications above-mentioned. *Id.*

In all corporations within the Municipal Corporation Act, to which a separate quarter sessions is or shall be granted, every burgess is qualified and liable to serve on grand juries in such borough, and also upon juries for the trial of all issues joined in any court of quarter sessions of the peace triable within the borough, of which such person shall be a burgess. 5 & 6 *W.* 4, c. 76, s. 121.

If persons serve on a jury, who are not qualified, it is only matter of challenge, and must be objected to, if at all, by way of challenge. *Semb.* See *R. v. Sutton et al.*, 8 *B.* & *C.* 417. *R. v. Sullivan et al.*, 8 *Ad.* & *El.* 831.

Exemptions.] Peers are exempt from serving on juries; so are the judges of the courts of record at Westminster; clergymen in holy orders; priests of the Roman Catholic faith, who have taken and subscribed the oaths and declarations required

by law; persons who teach or preach in a congregation of protestant dissenters, whose place of meeting is registered, and who follow no secular occupation, except that of schoolmaster, producing a certificate of some justice of the peace of their having taken the oaths and subscribed the declaration required by law; serjeants and barristers-at-law actually practising; members of the society of doctors of law, and advocates of the civil law actually practising; attornies, solicitors, and proctors actually practising, and having duly taken out their annual certificates; officers of the courts of law and equity, and the ecclesiastical and admiralty courts; coroners, gaolers and keepers of houses of correction; members and licenciates of the royal college of physicians, actually practising; surgeons, being members of the royal college of surgeons, in London, Dublin, or Edinburgh, and actually practising; apothecaries, certificated by the Apothecaries' Company, and actually practising; officers of the navy or army on full pay; pilots licensed by the Trinity House, at Deptford, Hull, or Newcastle-upon-Tyne, and masters in the buoy or light service of these corporations, and pilots licensed by the lord warden of the cinque ports, or by statute or charter in any other port; household servants of Her Majesty; officers of customs or excise, sheriff's officers, high constables and parish clerks. 6 G. 4, c. 50, s. 2. *And see* 5 & 6 W. 4, c. 76, s. 121. The inhabitants of the city and liberty of Westminster also, are exempt from serving on juries at the sessions of the peace for the county of Middlesex. 6 G. 4, c. 50, s. 49.

Aliens are not qualified to be jurors, except upon juries *de medietate lingue*; 6 G. 4, c. 50, s. 3; but this is mere matter of challenge. *R. v. Sutton et al.*, 8 B. & C. 417. Also persons attainted of treason or felony, or convicted of any crime which is infamous, unless they have obtained a free pardon, or persons under outlawry or excommunication, shall not be qualified to serve on juries. 6 G. 4, c. 50, s. 3.

No justice of the peace shall be summoned or impanelled as a juror, to serve at the sessions of the peace for the jurisdiction of which he is a justice. 6 G. 4, c. 50, s. 48.

Besides the exemptions above-mentioned, every member of the council of any borough, every justice assigned to keep the peace therein, and the treasurer and town-clerk thereof, shall be exempt and disqualified from serving on any jury within the borough, and shall be exempt from serving on any other jury within the county in which such borough is situate; and all burgesses of a borough, for which a separate court of quarter sessions shall be holden, shall be exempt from serving on juries for the trial of issues at the sessions of the county. 5 & 6 W. 4, c. 76, s. 22.

Formerly Quakers and Moravians could not serve on juries, for they could not be sworn; *see R. v. Channens, Ry. &*

M. 374 ; but as they may now make an affirmation instead of an oath (*see ante*, p. 149), they may be jurors in both civil and criminal cases. So may members of the sect called Separatists. *Ante*, p. 150. *See the form of the affirmation, ante*, p. 150.

Jury de medietate linguæ.] On the prayer of every alien, indicted or impeached of any felony or misdemeanor, the sheriff or other proper minister shall, by command of the court, return for one half of the jury, a competent number of aliens, if so many be in the town or place where the trial is had, and if not, then so many aliens as shall be found in the same town or place, if any ; and no such alien jurors shall be challenged for want of freehold or other qualification, although they may for any other cause. 6 *G.* 4, c. 50, s. 47. Where an alien woman, married to a British subject, was, with her husband, indicted for murder, it was holden by the judges of the appeal court, that she was not entitled to have a jury *de medietate linguæ* ; for by stat. 7 & 8 Vict. c. 66, s. 16, any woman married to a natural-born subject or person naturalized, shall be deemed and taken to be herself naturalized, and have all the rights and privileges of a natural-born subject. *R. v. Maria Manning*, 19 *Law J.*, 1 *m.* 2 *Car. & K.* 887.

How returned, summoned, &c., in counties.] In the first week in July in every year, the clerk of the peace in every county shall issue his warrant to the high constables, commanding them to issue their precepts to the churchwardens and overseers of the poor of the several parishes within their respective constablewicks, requiring them to return a list of all men residing within their parishes, &c., qualified and liable to serve on juries. 6 *G.* 4, c. 50, s. 4. The high constables make out their precepts accordingly ; *Id.* s. 6 ; and the churchwardens and overseers make out their lists ; *Id.* s. 8 ; and fix a copy on the church door on the three first Sundays in September ; *Id.* s. 9 ; and at a special petty sessions, to be holden in the last week in September, these lists shall be produced, and the justices may then strike out the names of any persons not qualified, or not able to serve by reason of any infirmity, or insert those omitted ; and the lists so revised shall then be delivered to the high constable, who shall deliver them to the court of quarter sessions at the next session. *Id.* s. 10. The lists are then copied into "The jurors' book" by the clerk of the peace, and the book delivered by him to the sheriff, to be used from the 1st of January, for one year. *Id.* s. 12.

Before each assizes or sessions, a precept issues to the sheriff, requiring him to return a competent number of jurors ; *Id.* s. 13 ; and the sheriff shall thereupon return the names of men contained in the jurors' book, and no others. *Id.* s. 14. For the assizes, the judges appointed may order the sheriff to

return any number not exceeding 144, to serve indiscriminately on the civil and criminal sides, and to divide them into two sets, one to serve at the beginning of the assizes, the other for the remaining time. *Id. s. 22.* And the jurors shall be summoned ten days at least before the day they are required to attend. *Id. s. 25.* In cases of treason or misprision of treason, a list of the jurors returned, mentioning their names, professions, and places of abode, shall be delivered to the prisoner at the same time with the copy of the indictment. *Id. s. 21.*

By sect. 20, the court of King's Bench, and all courts of oyer and terminer and gaol delivery, the superior criminal courts of the three counties palatine, and courts of sessions of the peace, shall respectively have and exercise the same power and authority as they have heretofore had and exercised, in issuing any writ or precept, or in making any award or order, orally or otherwise, for the return of a jury for the trial of any issue before any such courts respectively, and for the amending or enlarging the panel of jurors returned for the trial of any such issue; and the return to every such writ, precept, award, or order, shall be made in the manner heretofore used and accustomed in such courts respectively, save and except that the jurors shall be returned from the body of the county, and not from any particular hundred, &c., and that they be qualified according to this Act. This seems to recognize the right of a court of quarter sessions, amongst others, to order the sheriff to return a jury immediately, as well in misdemeanors as felonies, which seems formerly to have been doubted. See 2 *Hawk. c. 4, ss. 1, 4.* 2 *Hale*, 261, 262.

The sheriff shall register in the jurors' book the names of such petty jurors as shall have served at the assizes, and give them certificates of their service; 6 *G. 4, c. 50, s. 40*; and the clerk of the peace shall send him a list of those who have served at sessions, which he shall likewise register; *Id. s. 41*; and no man, having such certificate, shall afterwards be summoned to serve at the assizes, for one year in Wales, or the counties of Hereford, Cambridge, Huntingdon, or Rutland,—for four years in Yorkshire,—and for two years in any other county;—or to serve at the sessions, within one year in Wales, or the counties of Hereford, Cambridge, Huntingdon, or Rutland,—or within two years in any other county. *Id. s. 42.*

Jurors in boroughs.] In boroughs within the Municipal Corporation Act, 5 & 6 *W. 4, c. 76*, to which separate quarter sessions have been or shall be given, seven days at the least before the holding of every quarter sessions, the clerk of the peace shall cause to be summoned a sufficient number of persons, being qualified and liable as before mentioned (*ante*, p. 157), to serve as grand jurors at every such sessions, and shall also cause to be summoned not less than thirty-six nor

more than sixty persons so qualified and liable to serve as jurors at every such sessions. 5 & 6 W. 4, c. 76. s. 121. The clerk of the peace shall make out a list of the grand jurors, and a panel of the petty jurors, containing their names, places of abode, and descriptions. *Id.*

Grand jury called, sworn, and charged.] The clerk of arraigns at the assizes, or the clerk of the peace at the sessions, calls over the names of the grand jurors. This is the first business done at the sitting of the court. As each juror answers, he goes into the jury box. The number must be at least twelve, see 2 Hale, 161, and must not exceed twenty-three. 2 Burr. 1088. They are sworn in this form; and first the foreman, thus:—"You, as foreman of this inquest, shall diligently inquire and true presentment make of all such matters and things as shall be given you in charge. The Queen's counsel, your fellows' and your own, you shall keep secret. You shall present no man for envy, hatred, or malice; neither shall you leave any man unpresented for fear, favour, or affection, or hope of reward; but you shall present all things truly, as they come to your knowledge, according to the best of your understanding: So help you God." The remaining jurors are then sworn thus: "The same oath which your foreman has taken upon his part, you and every of you shall well and truly observe and keep on your parts: So help you God."

The usual proclamation against vice and profaneness is then made. Then proclamation is made for silence, whilst the charge is delivered to the grand jury.

The judge at the assizes, or the chairman at the quarter sessions, then charges the grand jury. After which the grand jury retire to their room, to consider such bills of indictment as may be brought before them; and from time to time return them into court, as has been already mentioned, *ante*, pp. 98, 99.

The prisoners against whom bills are found, are then arraigned, and plead, as mentioned *ante*, p. 108; and their cases are then ready for trial.

Petty jury called and sworn.] The petty jurors are called, and the first twelve who answer to their names usually go into the jury box. On the first day of the assizes or sessions, the whole list of jurors is usually called over, as soon as the grand jury are charged and have retired. And by stat. 6 G. 4, c. 50, s. 38, if any man summoned to attend upon a jury, shall not attend in pursuance of such summons,—or being thrice called shall not answer to his name,—or if he be present but do not appear,—or if after appearing he wilfully withdraw himself from the presence of the court: the court shall set such fine upon him as it shall think meet, unless some reasonable ex-

cuse for the default shall be made by oath or affidavit. The stat. 5 & 6 W. 4, c. 76, s. 121, as to jurors at the quarter sessions in boroughs, contains a similar enactment, with this addition, that if the fine be not paid, the court shall make an order that the same may be levied by distress and sale of the party's goods.

If there have been a view, those jurors who have had the view, are first called. It must be observed, however, that a view can be had in a criminal case, only where the indictment is pending in the court of Queen's Bench, 6 G. 4, c. 50, s. 23, or with the consent of the opposite party. See *R. v. Whalley*, 2 Car. & K. 376. But in one case, in the Crown Court at the Assizes, where the defendant wished the jury to view the place where the offence (rape) was said to have been committed, which was in the immediate vicinity of the court, the judge allowed the jury to have a view, although the counsel for the prosecution did not consent. *Id.* In all cases where a view is necessary, if the opposite party consent, a rule for it or a judge's order in vacation, may be had almost as of course; but without consent, the only mode of obtaining it, is by removing the indictment into the court of Queen's Bench by *certiorari*, and then applying for and obtaining the rule.

Upon a full jury appearing, the prisoners who have been arraigned, being at the bar, the clerk of the arraigns at the assizes, or the clerk of the peace at sessions, in cases of treason or felony, addresses the prisoner thus: "*Prisoners: these good men who shall now be called, are the jurors who are to pass between our sovereign Lady the Queen and you upon your [respective] trials; if therefore you [or either of you, or any of you] would challenge them or any of them, you must challenge them as they come to the book to be sworn, and before they are sworn, and you shall be heard.*"

In treason and felony the names of the jurors are then separately called over by the clerk of arraigns or clerk of the peace, and the crier of the court administers the oath to each of them, thus: "*You shall well and truly try, and true deliverance make, between our sovereign Lady the Queen and the prisoners at the bar, whom you shall have in charge, and a true verdict give according to the evidence: So help you God.*" As to the affirmation of Quakers, Moravians, and Separatists, see *ante*, p. 150.

As each juror is named, and before he is sworn, or rather before the oath or affirmation is tendered to him, the prisoner may challenge him, as mentioned *infra*.

But in misdemeanors, the jury are at once sworn, usually four jurors at a time, without giving the defendants their challenges as above-mentioned. The oath is thus: "*You shall well and truly try the issue joined between our sovereign Lady the Queen and the defendants, and a true verdict give according to the evidence: So help you God.*"

Challenges of jurors.] The jurors must be challenged, if at all, before they are sworn, 2 *Hawk. c. 43, s. 1*, or the oath or affirmation tendered to them. And where, after the jury were all sworn, the case opened, and one witness examined, the foreman intimated to the court that there was a relation of the defendant on the jury, Erskine, J. (after conferring with Tindal, C. J.), held, that he had no power to discharge the jury, and that the case must therefore proceed. *R. v. Wardle, Car. & M. 647.*

The Queen or the party may challenge the whole array, for favour. 1 *Inst. 156.* In *R. v. Dolby*, (1 *Car. & K. 238*), the defendant, being indicted in Middlesex, before the court of King's Bench, for a seditious libel, challenged the array, because he said that he was prosecuted by an association called the Constitutional Association, and that one of the sheriffs who returned the jury was one of the association; the counsel for the prosecution thereupon took issue; the chief justice then appointed two triers to try the issue, who were accordingly sworn; the counsel for the defendant first addressed these triers, and called a witness, who proved that the sheriff named was one of the subscribers to the association; the counsel for the prosecution then addressed the triers, and called a witness to prove that the sheriff had ceased to be a subscriber to or member of the association before the return of the jury process, but failed in proving it for want of the letter by which the sheriff had withdrawn himself from it; the triers were then addressed by the counsel for the defendant in reply; the chief justice summed up; the triers thereupon found in favour of the challenge; and the cause was adjourned. This will be found to be a good precedent to follow, in similar cases, where issue is taken on the challenge. In another case, *R. v. Hughes* (1 *Car. & K. 235*), the counsel for the prosecution demurred to the challenge, as being too general, in merely stating that the sheriff had not chosen the panel indifferently and impartially, and that the panel was not an indifferent panel, without showing in what respect the sheriff had acted partially, &c.; the counsel for the defendant joined in demurrer; the two judges, Gurney, B. and Cresswell, J., after argument, allowed the demurrer, and the trial proceeded.

The prisoner may peremptorily challenge twenty jurors in murder or other felony; 6 *G. 4, c. 50, s. 29*; thirty-five in treason; but there is no peremptory challenge in misdemeanors, *R. v. Reading, 7 How. St. Tr. 264*, or upon the trial of collateral issues. *Fost. 42. R. v. Ratcliffe, 1 W. Bl. 3.* Every peremptory challenge above the limited number, is void, and the trial may proceed as if no such challenge had been made. 7 & 8 *G. 3, c. 28, s. 3.*

The Queen has no peremptory challenge; she can only challenge for cause; 6 *G. 4, c. 50, s. 29*; but she is not bound to show the cause, until the whole panel be gone through,

and it appear that there will not be a full jury without the person challenged. 2 Hawk. c. 43, s. 3. See *R. v. Geach*, 9 Car. & P. 499.

The prisoner, besides his peremptory challenges, may also challenge as many of the jury as he pleases for cause, showing the cause presently, 1 Inst. 158. 2 Hawk. c. 43, s. 10, and being prepared to prove it. *R. v. Savage*, Ry. & M. 51. Thus, he may challenge a juror, because he is a peer; 1 Inst. 156. 2 Hawk. c. 43, s. 11; or because he is one of the grand jurors who found the indictment; *Lamb*. 554; or because he has not the qualification required by the Jury Act; 6 G. 4, c. 50, s. 27. 2 Hawk. c. 43, s. 12; or because he is an alien; 1 Inst. 156. 2 Hawk. c. 43, s. 10; or because he is under age; 1 Inst. 157. 2 Hawk. c. 43, s. 10; or because he is outlawed; 2 Hawk. c. 43, s. 27; or because he is of kindred or affinity to the prosecutor; *Samb.* 1 Inst. 157. See *R. v. Wardle*, ante, p. 163; or because he has made some declaration, showing a prejudice against the prisoner; 2 Hawk. c. 43, s. 28; or the like. If a person serve on the jury, who has been regularly summoned, but against whom there is a cause of challenge, for which the prisoner would have challenged him if he were aware of it, still this is no ground for applying for a new trial. *R. v. Sutton*, 8 B. & C. 417. Where a son served on a jury for his father, at his father's request, and without collusion with either the prosecutor or the defendant, and the son was under age and had no qualification, nor was his name upon the panel: the court of King's Bench held this to be a mistrial, and granted a new trial. *R. v. Tremourne*, 5 B. & C. 254. But by stat. 7 G. 4, c. 64, s. 21, no judgment after verdict upon any indictment or information for any felony or misdemeanor, shall be stayed or reversed for any misnomer or misdescription of any of the jurors, nor because any person has served upon the jury who has not been returned as a juror by the sheriff or other officer.

No challenge can be made, until after a full jury appears. *R. v. Edmunds*, 4 B. & Ald. 471.

The following is the form of a

Challenge to the Array.

And hereupon the said A. B. doth challenge the array of the panel aforesaid; because he saith that [&c., stating the particulars of the cause of challenge]: And this he the said A. B. is ready to verify; wherefore he prayeth judgment that the said panel may be quashed.

The challenge to individual jurors (which is called a challenge to the polls), is made verbally, whether it be a peremptory challenge, or for cause. Indeed a challenge to the polls

for cause, seldom occurs in practice; for the counsel either for the defendant or the prosecution, have only to intimate to the clerk of arraigns or clerk of the peace that they desire that a particular juror or jurors named may not be put upon the jury, and he will in general refrain from calling them.

Petty jury charged.] When the challenges (if any) have been disposed of, and a full jury have been sworn, the clerk of the arraigns at the assizes, or the clerk of the peace at sessions, in cases of treason and felony, and in cases of misdemeanors if no counsel be employed for the prosecution, charges the petty jury with each case, thus: "*Gentlemen of the jury: the prisoner stands indicted, by the name of A. B., [late of, &c.,] for that he on the*" [&c., as in the indictment, to the end]. "*Upon this indictment he has been arraigned, and upon his arraignment he has pleaded not guilty, and for his trial has put himself upon his country, which country you are: Your charge therefore is, to inquire whether he is guilty of the [felony] whereof he stands indicted, or not guilty, and to hearken to the evidence.*"

By stat. 14 & 15 Vict. c. 19, s. 9, reciting that by the stat. 12 & 13 Vict. c. 11, and that Act, provisions were made for the more exemplary punishment of persons who should commit certain offences after one or more previous conviction or convictions for the like or other offences, and it was expedient to define the time of charging the jury to inquire as to such previous conviction or convictions: it is enacted, "that it shall not be lawful on the trial of any person for any subsequent offence, where a plea of not guilty shall have been entered on his behalf, to charge the jury to inquire concerning any previous conviction, until they shall have inquired concerning such subsequent offence, and shall have found such person guilty of the same; and whenever in any indictment any previous conviction shall be stated, the reading of such statement shall be deferred until after such finding as aforesaid: provided, that if upon the trial of any person for any such subsequent offence as aforesaid, such person shall give evidence of his good character, it shall be lawful for the prosecutor, in answer thereto, to give evidence of the conviction of such person, for the previous offence or offences, before such verdict of guilty shall have been returned, and the jury shall inquire concerning such previous conviction or convictions at the same time that they inquire concerning such subsequent offence." The recital here makes no mention of prosecutions for subsequent felonies after a previous conviction for felony within stat. 7 & 8 G. 4, c. 28, s. 11. But as the enacting part is general,—"*on the trial of any person for any subsequent offence,*"—there is no doubt this section would be holden to apply to it.

SECTION II.

The Trial.

Before the trial is commenced, it may be necessary for the prosecutor or prisoner to make some application to the court. The prosecutor may move to postpone the trial, on account of the absence of a material witness; and if the absent witness be one of those who were examined before the committing magistrate, the judge has an opportunity of ascertaining from the deposition, whether he is a material witness or not; but if he were not examined before the magistrate, the judge in that case will require an affidavit, stating what the witness is expected to prove. *R. v. Savage et al.*, 1 *Car. & K.* 75. Where, to account for a witness being unable to attend, a surgeon made affidavit that the witness was the mother of an unweaned child, which was afflicted with inflammation of the lungs, and that the child could neither be brought to the assize town, nor be separated from its mother, without danger to its life: this was deemed sufficient ground for postponing the trial. *Id.* But where, upon a prisoner being about to be tried for carnally knowing a girl of only six years of age, an application on the part of the prosecution was made to postpone the trial, until the child could be instructed as to the obligation of an oath: Pollock, C. B., refused it. *R. v. Nicholas*, 2 *Car. & K.* 246. And where the trial had been postponed twice, on account of the absence of a witness, and at the third assizes it appeared, that notwithstanding the most diligent inquiry, he could not be found, and one of the deponents stated that he heard that he had embarked for India, as a soldier: Maule, J., on application of the prosecutor, discharged the prisoners, and discharged the prosecutor's recognizances, notwithstanding the prisoners opposed it. *R. v. Bridgman et al.*, *Car. & M.* 271.

In like manner the prisoner may apply to postpone the trial, on account of the absence of a material witness. And where a witness for the prosecution was absent, who had been examined before the committing magistrate, and the prisoner stated in an affidavit that it would be material to his defence that such witness should be cross-examined by his counsel: Cresswell, J. (after conferring with Patteson, J.), postponed the trial, saying that he would not require an affidavit of any diligent search having been made for the witness, as the witness being bound over to attend, the prisoner would naturally expect he would appear. *R. v. Macarthy*, *Car. & M.* 625. But where, upon an indictment for murder by poison, the counsel for the prisoner applied to postpone the trial, on the ground that the names of witnesses were on the back of the

indictment, who were not examined before the magistrate, and who it was understood were to be called to prove previous attempts of the prisoner to poison the deceased, and it was material for the prisoner that those alleged attempts should be investigated, and the character of the witnesses inquired into : Alderson, B., after consulting with Rolfe, B., refused the application as unprecedented. *R. v. Johnson*, 2 Car. & K. 354. In strictness, all applications of this kind, whether on the part of the prosecutor or prisoner, should be made before the jury are sworn. But where the prisoner made the application after the jury were sworn and charged, Cresswell thought that it might be done ; but the affidavit produced being insufficient, the trial proceeded, and the defendant was convicted. *R. v. Fitzgerald et al.*, 1 Car. & K. 201.

So, a defendant may move that money which has been taken from him by the constable, &c., may be delivered up to him, and the court will make the order accordingly, although the money is sought to be retained to pay the expense of conveying the defendant to prison ; *R. v. Bass*, 2 Car. & K. 882 ; but if it appear, or be probable, that such money was part of the produce of the offence with which the prisoner is charged, the court usually refuse the application.

Either party, immediately after the jury are charged, or indeed at any time during the trial, may apply to have the witnesses for the opposite party sent out of court ; and the court will make an order accordingly. The attornies of the respective parties, however, are never included in this order ; *Pomeroy v. Baddeley*, Ry. & M., N. P. C. 430 ; nor is the surgeon or any other witness, who is to depose to mere matter of opinion, and not to facts. If the witness do not withdraw when ordered, or afterwards return into court before he is called for, and is present during the examination of some other witness, it is discretionary with the judge whether he will allow him to be examined or not. *Parker v. M'William*, 6 Bing. 683. *R. v. Coley*, 1 Moody & M. 329.

Case stated, and evidence for the prosecution.] If counsel be engaged for the prosecution,* he addresses the jury, states

* It is a bad, a mischievous economy to cast upon the judge, recorder, or chairman, the task of examining the witnesses, and, in appearance at least, of conducting the prosecution against the prisoner. It must be mortifying to the judge to find that he, who is deemed the prisoner's counsel, or who at all events is to hold the scales evenly between the prosecutor and the prisoner, should be thrust forward into the place of prosecutor, to ex-

amine the witnesses, and to play the advocate against the very party for whom he is deemed counsel. Those who know the high honour of those learned persons, their anxiety that all trials before them should be conducted in the true spirit of English fairness, may readily imagine the dislike, disgust, they must feel, when they find a duty cast upon them, so ill becoming their position, their station, and the nature of their office. I say it is a bad, a mis-

the case to them, and then calls the witnesses to prove it. As to the examination, cross-examination, and re-examination of witnesses, they belong more properly to a treatise on evidence; and I have treated of them so fully in other works,* and of the rules by which they are regulated, that I must refer the reader to them for the law upon these subjects. If there be no counsel for the prosecution, the prosecutor has no right to address the jury as counsel, particularly if he is to be examined as a witness himself in the course of the trial. *R. v. Brice*, 2 B. & Ald. 606. *R. v. Milne*, *Id.* 606 n.

Each witness is sworn in this form:—“*The evidence you shall give to the court and jury sworn, between our sovereign Lady Queen and the prisoner at the bar [or defendant], shall be the truth, the whole truth, and nothing but the truth: so help you God.*”

The prosecutor is not bound to call all the witnesses on the back of the bill; but he must have them in court, in order that the prisoner may examine any of them whose evidence he may require. If the prisoner call them, however, he makes them his witnesses. *Per Alderson, B.*, in *R. v. Woodhead*, 2 Car. & K. 520, and stated to be the rule then lately laid down by the judges. On the other hand, the prosecutor is not confined to the evidence which was adduced before the committing magistrates, but at the trial he may call such other witnesses, and give such other evidence as he may think proper. *R. v. Ward*, 2 Car. & K. 759.

In one case, *R. v. Crowhurst*, 1 Car. & K. 370, which was an indictment for stealing a piece of wood, it appeared that when it was found in the prisoner's possession, he said he had bought it of one Nash, who lived about two miles off; but Nash was not called as a witness for the prosecution: Alderson, B., laid it down as a general principle, that where a man, in whose possession stolen property is found, gives a reasonable account how he came by it, as by telling the name of the person from whom he received it, and who is known to be a real person,—it is incumbent on the prosecutor to show that such account is false. And in a more recent case, Lord Denman, C. J., said that he agreed with Mr. Baron Alderson, in what he had stated on that occasion, and that the case was correctly reported. *R. v. Smith*, 2 Car. & K. 208. Before the case above mentioned, however, it was the

chievous economy: it may save some money to the county or borough fund; but it must tend to lower the sense the people entertain of the fair, the impartial manner in which justice is really administered to them, and create a distrust where there should be, and there deserves to be, unbounded confidence. I hope and

trust this practice, which I most heartily deprecate, will soon cease to exist.

* Examination, *Arch. Pl. & Ev. Civ. Act.* 481. 1 *Arch. N. P.* 33. Cross-examination, *Arch. Pl. & Ev. Civ. Act.* 485. 1 *Arch. N. P.* 38. Re-examination, *Arch. Pl. & Ev. Civ. Act.* 488. 1 *Arch. N. P.* 40.

generally received opinion, that if a person set up that defence, either before the magistrate or at the trial, it was his duty to produce the witness to prove it, or if he were too poor to do so, the magistrate should send for the person named, and examine him if the prisoner wished it. However if the account given by the prisoner be not a reasonable one,—if for instance he say on one occasion that he bought the article, and on another that he and two others found it hid in a hay rick, *R. v. Dibby*, 2 Car. & K. 818, or the like,—this will impose no such burden on the prosecutor.

Case stated and evidence for the defence.] The defendant in all cases has, and at all times had, a right to address the jury in his defence. In misdemeanors he always was and still is allowed to do this by counsel. In high treason he was first allowed to do so, by stat. 7 & 8 W. 3, c. 3, s. 1; which adds, that “in case any person or persons so accused or indicted shall desire counsel, the court before whom such person or persons shall be tried, or some judge of that court, shall and is hereby authorized and required immediately, upon his or their request, to assign to such person and persons such and so many counsel, not exceeding two, as the person or persons shall desire, to whom such counsel shall have free access at all reasonable times.” And by stat. 6 & 7 W. 4, c. 114, s. 1; “all persons tried for felonies shall be admitted, after the close of the case for the prosecution, to make full answer and defence thereto, by counsel learned in the law, or by attorney in courts where attorneys practise as counsel.” If however the defendant wish to address the jury, and to examine and cross-examine witnesses, he will of course be allowed to do so, and his counsel will be allowed to argue any points of law that may arise in the course of the trial, and to suggest questions to him for the cross-examination of the witnesses. *R. v. Parkins, Ry. & M.*, N. P. C. 166. But he cannot have counsel to examine and cross-examine the witnesses, and reserve to himself the right of addressing the jury. *R. v. White*, 2 Camp. 98.

As to the defendant's right to have a copy of the depositions, see *ante*, p. 51.

Witnesses in reply.] If the defendant set up any defence, and call witnesses to prove it, the prosecutor may then give evidence in reply. This evidence must be strictly confined to the defence: the prosecutor will not be allowed to wander from that, even for the purpose of giving evidence on the original charge. Where upon an indictment for larceny, the prosecutor rested his case upon the prisoner's recent possession of the goods; the prisoner set up as a defence, that he bought the goods of J. T., and he called a witness to prove it; the prosecutor then proposed to call J. T. to prove, not only that he

did not sell the goods to the prisoner, but that he saw the prisoner steal them : it was holden however that he could not do this, but must confine his evidence to the defence merely. *R. v. Stimpson*, 2 Car. & P. 415, and see *R. v. Hilditch et al.*, 5 Car. & P. 299. *R. v. Powell*, Car. & M. 500.

Upon the plaintiff calling witnesses in reply, the defendant's counsel has a right again to address the jury, confining his observations however to the witnesses so called, and the testimony given by them. And the prosecutor's counsel is then entitled to the general reply.

Reply, &c.] The attorney-general, when prosecuting for the crown, has the privilege of replying, although no evidence have been given or witnesses called for the defendant; *By the Judges*, 2 Car. & K. 636 n.; and this, even upon the trial of collateral issues. *R. v. Radcliffe*, 1 W. Bl. 3. And so has any other counsel representing him. *R. v. Gardner*, 2 Car. & K. 628. In other cases, the counsel for the prosecutor is entitled to the general reply, upon the entire case, if the defendant call and examine witnesses; but if the witnesses be merely to character, the counsel for the prosecution seldom avails himself of this privilege. In one case, where the counsel for a defendant upon the trial of an indictment for a misdemeanor, opened new facts in his address to the jury, but afterwards declined to call witnesses to prove them, it was holden that the counsel for the prosecution was entitled to the general reply. *R. v. Bignold*, 4 D. & R. 70. But this has since been frequently ruled otherwise at *nisi prius*.

Adjournment of the trial.] If the trial cannot be concluded in one day, the court will adjourn it to the next day, or if that happen to be Sunday, to the Monday, until the trial is completed. And in the meantime, in treason and felony, the court order the sheriff to provide proper accommodation for the jury at some tavern or other place; and a bailiff is sworn thus: "*You shall well and truly keep this jury, and neither speak to them yourself, nor suffer any other person to speak to them, touching any matter relative to this trial: So help you God.*" See *R. v. Stone*, 6 T. R. 530. *R. v. Hardy*, 24 How. St. Tr. 414. 572. And the undersheriff and bailiff accompany them the next morning to court, and take care to have them there at the time appointed. But upon the trial of a misdemeanor, it is not usual to keep the jury thus together, but they are allowed to depart to their respective houses or lodgings, with a caution, however, to attend in court punctually at the time to which the trial is adjourned, and in the meantime not to hold communication with any person upon the subject of the trial. See *R. v. Kinnear*, 2 B. & Ald. 462.

Summing up.] After the case has been closed on both sides, the judge at the assizes, or the chairman or recorder at sessions, then sums it up to the jury. He first states the substance of the charge against the prisoner; he then, if necessary, explains to them the law upon the subject; he next reads the evidence which has been adduced in support of the charge, making occasionally such observations as may be necessary to connect the evidence, to apply it to the charge, and to render the whole plain and intelligible to the jury; he then states the defence, and the evidence given on the part of the defendant; and he usually concludes by telling the jury, that if, upon considering the whole of the evidence, they entertain a fair and reasonable doubt of the guilt of the prisoner, they should give the prisoner the benefit of that doubt, and acquit him.

It may be necessary to state, that a bill of exceptions will not lie; it is never allowed in a criminal case. See *R. v. Preston-upon-the-Hill, Burr. S. C. 77, 2 Str. 1040.*

In what cases the court have a power of amending at the trial, see *ante*, pp. 99, 100.

As soon as the summing up is concluded, the clerk of arraigns, or clerk of the peace, says to the jury,—“*Gentlemen, consider of your verdict.*” The jury accordingly consult with each other upon the subject.

SECTION III.

Verdict.

Retiring of the jury.] If the jury find any difficulty in coming to a conclusion, and wish to retire to the jury room for the purpose of discussing the matter more freely in private, they may intimate their wish to the clerk of arraigns or clerk of the peace; and the crier of the court will then swear a bailiff to attend them, thus:—“*You shall swear that you will keep this jury, without meat, drink, or fire, (candle light only excepted;) you shall suffer none to speak to them; neither shall you speak to them yourself, but only to ask them whether they are agreed upon their verdict: So help you God.*”

After the jury have thus retired, they may come back for the advice or opinion of the court upon any point; or they may request the judge, chairman, or recorder, to read over to them again any particular part of the evidence; or they may get the court to ask any particular question of the witnesses. All this, however, must be done in open court.

In what cases the jury may be discharged.] The general rule is, that the jury must be kept together from the time they are first charged with the prisoner or defendant, until they deliver their verdict, unless the prisoner consent to their being

discharged. 2 *Hawk. c. 47, s. 1*. But cases occur, in which the judge from necessity is obliged to discharge them. If they cannot agree upon their verdict, and they appear not likely to do so, the judge, chairman, or recorder, in the exercise of his discretion, may discharge them, as soon as it becomes a matter of necessity, of which he is to judge; *R. v. Newton*, 13 *Shaw's J. P.* 666; and he usually discharges them, after they have been one night locked up in their jury room, deliberating on their verdict. Where a jury retired to consider of their verdict between one and two in the afternoon, and were locked up all night, and being brought into court the next morning, declared that there was no likelihood of their agreeing, the judge discharged them, the business of the assizes being over, and the commission opened for the next county on the circuit: the court of Queen's Bench held, that he had properly exercised his discretion in doing so. *R. v. Newton, supra*. But this discharge of the jury has no effect on the prisoner; he has no right on that account to be discharged, but must, if in custody, remain imprisoned until another jury can be charged with him, *R. v. Newton, supra*, unless in the meantime he be bailed.

There are other cases, also, where from necessity the judge is obliged to discharge the jury. Where during a trial for murder, one of the jury was seized with a fit, and was carried out of the court in a state of insensibility; and after the court had waited some time, it was deposed on oath that he was not in a fit state to return immediately: Lawrence, J., discharged the jury, and ordered another jury (consisting of the remaining eleven jurors, and a twelfth from the jury panel) to be sworn; and the prisoner was thereupon tried, convicted, and executed. *R. v. Scalbert*, 2 *Leach*, 620. The same also occurred before Wood, B., in 1812, upon the trial of one Edwards, for maliciously shooting, and the point being reserved for the opinion of the judges, they were unanimously of opinion that the judge had acted rightly. *R. v. Edwards*, *R. & Ry.* 224, 3 *Camp.* 207, 4 *Taunt.* 309. So where a defendant, in the case of a misdemeanor, became so ill, that he could not remain at the bar, the judge discharged the jury; and afterwards during the same assizes, upon his recovery, another jury were charged with him, and the whole of the proceedings were commenced *de novo*. *R. v. Streek*, 2 *Car. & P.* 413. So, where on a trial for manslaughter, it was discovered, after the swearing of the jury, that the surgeon who had examined the body was absent: upon the prisoner requesting that the jury should be discharged, they were accordingly discharged, and the prisoner was tried on the next day by another jury. *R. v. Stokes*, 6 *Car. & P.* 151. And upon a trial for high treason, where after the jury was sworn, it was intimated by one of the judges, that the defence the prisoners intended to set up, could not be given in evidence under the general issue that was

pleaded, the jury, with the consent of the attorney-general, was discharged, and the prisoners allowed to plead *de novo*, specially; and they were afterwards tried by another jury. *R. v. Alexander & Charles Kinloch*, *Fost.* 16, 1 *Wils.* 157. On the other hand, where a person is indicted for a misdemeanor, and upon the evidence it turns out to be a felony, the judge may discharge the jury, and order the party to be indicted for the felony; 14 & 15 *Vict. c.* 100, *s.* 12; or the jury may find him guilty of the misdemeanor. *Id.* And lastly, where an indictment for a misdemeanor was clearly bad upon the face of it, Abbott, C.J., discharged the jury from giving any verdict upon it. *R. v. Deacon*, *Ry. & M. N. P. C.* 27. *R. v. Hollis*, 2 *Stark.* 538.

Delivery of the verdict.] If the jury retire, then, upon their afterwards returning into court, the clerk of arraigns at the assizes, or the clerk of the peace at sessions, addresses them thus: "*Gentlemen of the jury, answer to your names;*" he then calls over their names, and the jurors respectively answer. They should all be in court at the time the verdict is given.

As soon as the jury are ready to deliver their verdict, the clerk of arraigns or clerk of the peace addresses them thus: "*Gentlemen, have you agreed upon your verdict? Who shall say for you? Your foreman. How say you, do you find the prisoner [or defendant] A. B. guilty of the [felony] whereof he stands indicted, or not guilty? Do you find the prisoner C. D. guilty of the [felony] whereof he stands indicted, or not guilty.*"

The jurors answer "*guilty,*" or "*not guilty;*" or they may say, "*We find him guilty of stealing, but not in the dwelling house to the value of five pounds,*" or "*not guilty of burglary, but guilty of the stealing,*" or the like. The verdict must be delivered openly in court. 2 *Hawk. c.* 47, *s.* 2. *Co. Lit.* 227. 3 *Inst.* 110.

For a less offence than is charged.] There are several cases where a greater offence includes a less; and upon an indictment for the greater offence, the jury may find the prisoner guilty of the less. As for instance,—

Upon an indictment for murder, the jury may find the prisoner not guilty of the murder, but guilty of manslaughter. 2 *Hawk. c.* 47, *ss.* 4, 5.

Upon an indictment for burglary and larceny, the jury may find the prisoner not guilty of the burglary, but guilty of the larceny. 2 *Hawk. c.* 47, *s.* 11.

Upon an indictment for breaking a house, shop, or warehouse, and stealing therein, the jury may find the prisoner not guilty of the breaking and entering, but guilty of the simple larceny, or (in the case of a dwelling-house) of stealing in the dwelling-house to the value of 5*l.*

Upon an indictment for stealing from a dwelling-house to the value of 5*l.*, or some person therein being put in fear, the jury may find the prisoner guilty of the simple larceny. See 2 *Hawck. c.* 47, *s.* 12.

Upon an indictment for robbery, the jury may find the prisoner not guilty of the robbery, but guilty of stealing from the person, *R. v. Walls et al.*, 2 *Car. & K.* 214, or guilty of an assault with intent to rob. 14 & 15 *Vict. c.* 100, *s.* 11.

Upon an indictment for any felony or misdemeanor, the jury may find the prisoner not guilty of the felony or misdemeanor, but guilty of an attempt to commit it. 14 & 15 *Vict. c.* 100, *s.* 9. Formerly, upon all indictments on stat. 1 *Vict. c.* 85, for stabbing, cutting, wounding, &c., or for any felony which included an assault, the defendant might be acquitted of the felony, and found guilty of the assault; 1 *Vict. c.* 85, *s.* 11; but that section is now repealed; indeed it was no longer necessary, when the more general enactment above-mentioned was made, that upon an indictment for any felony, &c., the defendant may be found guilty of an attempt to commit it.

For another offence than that charged.] Upon an indictment for embezzlement, the jury may find the prisoner not guilty of the embezzlement, but guilty of simple larceny, or guilty of larceny as a clerk or servant. 14 & 15 *Vict. c.* 100, *s.* 13.

Upon an indictment for larceny, the jury may find the prisoner not guilty of the larceny, but guilty of embezzlement. 14 & 15 *Vict. c.* 100, *s.* 13.

Upon an indictment for a larceny at one time, the jury may find the prisoner guilty generally, although the prosecutor gave evidence of three different takings of parcels of the goods within six months. See 14 & 15 *Vict. c.* 100, *s.* 17. See *ante*, p. 95.

Upon an indictment against two or more for jointly receiving stolen goods, the jury may find all or any of them guilty, who shall be proved to have separately received any portion of the goods, knowing the same to have been stolen. 14 & 15 *Vict. c.* 100, *s.* 14.

Upon an indictment against a woman for murder of her child, the jury may find her not guilty of the murder, but guilty of concealing its birth. 9 *G. 4, c.* 31, *s.* 14.

For the offence charged, though another proved.] Upon an indictment for obtaining money by false pretences, the jury may find the prisoner guilty, although the offence upon the evidence turn out to be larceny. 7 & 8 *G. 4, c.* 29, *s.* 53. But if he be indicted for a larceny, the jury cannot find him guilty, if the offence upon the evidence turn out to be an obtaining of money or goods by false pretences.

Upon an indictment for a misdemeanor, the jury may find the defendant guilty, though the evidence prove a felony. 14 & 15 Vict. c. 100. s. 12. See *ante*, p. 95. The court, however, may in such a case discharge the jury, and order the defendant to be indicted for the felony. *Id.*

Upon an indictment against a party as principal in a felony or misdemeanor, the jury may find him guilty, although the evidence prove that he was not present at the time the offence was committed, but merely incited, procured, or advised another party to commit it. See *ante*, pp. 16. 96.

Upon an indictment against a man as principal in the first degree, the jury may find him guilty, though the evidence prove him to have been a principal in the second degree; and upon an indictment against a man as principal in the second degree, the jury may find him guilty, although the evidence prove him to have been a principal in the first degree. *Ante*, p. 13. Where two were indicted for murder, A. in the first count being indicted as principal in the first degree, and B. as being present aiding and abetting, and in the second count B. was indicted as principal in the first degree, and A. with being present aiding and abetting; and the jury found them guilty, but said that they were not satisfied as to which of them actually committed the murder: the judges (*Maule, J., dis.*) held, that the jury were not bound to find the defendants guilty on one of the counts only, but might find them guilty on both. *R. v. Downing et al.*, 1 Den. CC. 52.

On several counts.] By stat. 11 & 12 Vict. c. 46, s. 3, which enables a prosecutor to include a count for stealing money or goods, and a count for receiving the same knowing them to have been stolen, in the same indictment against the same person or persons,—it is enacted, that “where any such indictment shall be preferred and found against any person, the prosecutor shall not be put to his election, but it shall be lawful for the jury, who shall try the same, to find a verdict of guilty, either of stealing the property or of receiving it knowing it to have been stolen; and if such indictment shall have been preferred and found against two or more persons, it shall be lawful for the jury who shall try the same, to find all or any of the said persons guilty, either of stealing the property or of receiving it knowing it to have been stolen, or to find one or more of the said persons guilty of stealing the property, and the other or others of them guilty of receiving it knowing it to have been stolen.”

In other cases, where there are two or more counts in the indictment, if the prosecutor be not put to his election to say on which he will proceed, the jury may convict on any one of them, or on all. If, however, they find a general verdict of guilty on all, and one count turns out to be bad,—although

this cannot be made matter of objection in arrest of judgment, *Grant v. Astle*, 2 Doug. 730. *Ayrey et al. v. Fearnside et al.*, 4 Mus. & W. 168. *Lewin v. Edwards*, 1 Dowd. N. C. 639. *Chadwick v. Trower et al.*, 8 Law J. 286 *ex*; it will be bad on error. *O'Connell's case*, Ho. Lords, 1844. In order to avoid this, it is usual to have a separate judgment on each count, and as all will take effect at the same time, the punishments will not be cumulative, and if one of the counts be bad, it will not affect the others. Where in one count A. B. was indicted for the murder of J. N. by a blow of a stick, and C. D. and E. F. indicted as being present aiding and abetting, and in a second count C. D. was indicted for the murder by throwing a stone, and A. B. and E. F. as being present aiding and abetting, and a general verdict given: this was objected to, as it left it uncertain whether the stick or stone caused the death; but the judges held it immaterial, the mode of death in both counts being substantially the same. *R. v. O'Brian et al.*, 1 Den. CC. 9. See also *R. v. Downing et al.*, *supra*.

Against some of several.] If several be jointly indicted for an offence, which in its nature may be committed by one person or several, the indictment is considered in law as a several indictment against each, and one may be convicted on it and the rest acquitted. 2 Hawk. c. 47, s. 8; *R. v. Taggart*, 1 Car & P. 201. But there are certain offences which cannot be committed by less than a certain number of persons: for instance, a riot, which cannot be committed by less than three persons; and a conspiracy, not by less than two. And therefore if several be indicted for a riot, and the jury acquit all but two, they must acquit those two also, unless it be charged in the indictment and proved, that they committed the riot together with some other person not tried upon that indictment. 2 Hawk. c. 47, s. 8. So, if upon an indictment for a conspiracy, the jury acquit all the defendants but one, they must acquit that one also, however criminal they may think him, unless it be charged in the indictment and proved, that he conspired with some other person, not tried upon that indictment. *Id.* So if a principal, and accessory either before or after the fact, be tried together upon the same indictment, if the jury acquit the principal, they must acquit the accessory also; but they may acquit the accessory, and find the principal guilty.

Special verdict.] The jury may find a special verdict in criminal cases, as well as in civil actions; they may do so even in capital cases. 2 Haw. c. 47, ss. 3, 9. But in modern practice this is very unusual.

SECTION IV.

Judgment, &c.

I shall treat of the proceedings from the verdict to the judgment and allowance of costs, &c., under the following heads:—

1. *Motion for a new Trial.*
2. *Motion in Arrest of Judgment.*
3. *Judgment.*
4. *Costs.*
5. *Restitution of stolen Goods.*
6. *Record.*

1. *Motion for a new Trial.*

A new trial cannot be granted in a case of felony, even by the court of Queen's Bench. *R. v. Mawbey*, 6 *T.R.* 638. That court may indeed grant it in the case of a misdemeanor; *Id.* See *R. v. Simmons*, 1 *Wils.* 329; but they have always refused to do so, where the defendant has been acquitted; *R. v. Brice*, 2 *B. & Ald.* 606; *R. v. Mann*, 4 *M. & S.* 337; *R. v. Cohen*, 1 *Stark.* 516; *R. v. Praed*, 4 *Burr.* 2256; *R. v. Reynell*, 6 *East*, 315; and this even in the case of an indictment for non-repair of a highway. *R. v. Silverton*, 1 *Wils.* 298; *R. v. Burbon*, 5 *M. & S.* 392; but see *R. v. Wandsworth*, 1 *B. & Ald.* 63; *R. v. Sutton*, 5 *B. & Ad.* 52. In these latter cases, indeed, instead of granting a new trial, the court stayed the entry of judgment, until the prosecutor should have an opportunity of preferring and trying a fresh indictment, to prevent the parish from pleading the former acquittal in bar; and even this they have done in very few cases. A court of oyer and terminer or general gaol delivery, however, or the court of quarter sessions, have no power to grant a new trial; at least such is generally understood to be the case. And where, upon an indictment for the non-repair of a bridge being tried on the crown side at the assizes, and the defendants convicted, they moved for a *certiorari* to remove the record into the court of King's Bench, in order that they might move for a new trial, the court refused it, Lord Ellenborough, C. J., saying,—“I would not have the notion for a moment entertained, that we have the power of entering into the merits of verdicts, and granting new trials, in proceedings before inferior jurisdictions. *R. v. Inhabitants of Oxfordshire*, 12 *East*, 411. But where two persons were indicted at sessions for stealing oats, and convicted; and it appearing afterwards that, upon the jury

retiring, one of the jurors separated himself from the rest, and conversed with a stranger on the subject of the trial, the sessions quashed the verdict, and awarded a *venire de novo* to the next sessions; and at the next sessions the prisoners were again tried and again convicted: they then brought a writ of error, and objected, first, that the sessions have no authority to grant a new trial; and secondly, that there had been no new arraignment and plea, before the second trial: as to the last point, the court held that the parties having once pleaded and put themselves upon the country, it was unnecessary for them to do so a second time; and as to the first point, the court said that this could not be deemed a new trial; the first trial was either good or bad; if good, the second trial was *coram non judice*, and might be deemed a nullity; if bad, it must be deemed a mistrial and a nullity, and therefore as the prisoners had put themselves upon the country, they might well be tried at the next sessions; in either view of the case, the judgment was right. *R. v. Fowler & Sexton*, 4 B. & Ald. 273.

2. Motion in Arrest of Judgment.

A defendant may move in arrest of judgment, for all defects or matters of objection which are not cured by verdict. I shall now, therefore, enumerate the defects which are cured by verdict, and which of course cannot be made the subject of a motion in arrest of judgment:

1. Every objection to an indictment for any formal defect apparent on the face thereof, shall be taken by demurrer or motion to quash such indictment, before the jury shall be sworn, and not afterwards; and every court before which any such objection shall be taken for any formal defect may, if it be thought necessary, cause the indictment to be forthwith amended in such particular by some officer of the court or other person, and thereupon the trial shall proceed as if no such defect had appeared. 14 & 15 Vict. c. 100, s. 25.

2. No judgment upon any indictment or information for any felony or misdemeanor, whether after verdict or outlawry, or by confession, default or otherwise, shall be stayed or reversed for want of the averment of any matter unnecessary to be proved,—or for the omission of the words "*as appears by the record*," or the words "*with force and arms*," or the words "*against the peace*,"—nor for the insertion of the words "*against the form of the statute*," instead of the words "*against the form of the statutes*," or *vice versa*; nor for that any person or persons mentioned in the indictment or information is or are designated by a name of office or other descriptive appellation, instead of his, her, or their proper name or names,—nor for omitting to state the time at which the offence was committed, in any case where time is not of

the essence of the offence; nor for stating the time imperfectly; nor for stating the offence to have been committed on a day subsequent to the finding of the indictment or exhibiting the information, or on an impossible day, or on a day that never happened;—nor for want of a proper or perfect venue, where the court shall appear by the indictment or information to have had jurisdiction over the offence. 7 G. 4, c. 64, s. 20. And this extends to indictments for offences committed abroad, as well as for offences committed in this country. *Douglas v. The Queen*, 17 Law J. 177m. This latter provision as to venue, however, does not aid the omission of venue, altogether, *R. v. O'Connor et al.*, 13 Law J. 33m., 5 Q. B. 16, or the laying of the venue in a wrong county. *R. v. Mitchel*, 2 Q. B. 636. By stat. 14 & 15 Vict. c. 100, s. 24, no indictment shall be holden insufficient for any of the defects above enumerated, or for want of a proper or formal conclusion, or for want of or imperfection in the addition of any defendant, or for want of the statement of the value or price of any matter or thing, or the amount of damage, injury or spoil, in any case where the value or price, or the amount of damage, injury or spoil is not of the essence of the offence. In what cases the indictment may be amended, see *ante*, pp. 99—101.

3. No judgment after verdict upon any indictment or information for any felony or misdemeanor, shall be stayed or reversed for want of a similitur;—nor by reason that the jury process has been awarded to a wrong officer upon an insufficient suggestion;—nor for any misnomer or misdescription of the officer returning such process, or of any of the jurors;—nor because any person has served upon the jury who has not been returned as a juror by the sheriff or other officer;—and that where the offence charged has been created by any statute or subject to a greater degree of punishment by any statute, the indictment or information shall after verdict be held sufficient, if it describe the offence in the words of the statute. *Id.* s. 21. See *R. v. Martin et ux.*, *Ad. & El.* 481.

4. We have seen (*ante*, p. 176) that where there are two or more counts, and one bad, and a general verdict as to both, this is not the subject of a motion in arrest of judgment: because the judgment may still be several, though the verdict be general. And where the indictment contained two counts for larceny, and a third count stating that the prisoner feloniously received and had the goods “so as aforesaid feloniously stolen, taken, and carried away,” it was moved to arrest the judgment, because the jury, by their verdict on the two first counts, had negatived the larceny “as aforesaid:” but the judges held that the last count was good, and the judgment ought not to be arrested;—some of them holding that the words “so as aforesaid” might be rejected as surplusage, and others that

supposing these words had the effect of importing into the third count that the prisoner had stolen the goods, that still the third count would be good. *R. v. Craddock*, 20 *Law J.* 21 *m.*

3. *Judgment.*

If no motion be made in arrest of judgment, or if made and decided against the defendant, the judge at the assizes, or the recorder or chairman at the sessions, proceeds to pass sentence. Sometimes this is done immediately after each trial; sometimes at the end of each day; sometimes on some other day of the assizes or sessions. The first seems to be the better method; at least it is calculated to have a better and more lasting effect upon the audience, in whose minds the crime and its punishment are thus immediately connected, the latter following speedily and certainly upon the former; it is therefore always observed in the case of treason and murder.

Where sentence of death is to be passed, the crier previously makes proclamation thus: "*All manner of persons, keep silence whilst sentence of death is passed upon the prisoner at the bar, upon pain of imprisonment.*" In capital cases, also, whether sentence is to be passed, or only recorded, the clerk of arraigns at the assizes asks the prisoner—"A. B., have you anything to say why sentence of death should not be passed [or recorded] against you;" upon which the prisoner may move in arrest of judgment, if that have not been already done, or he may address any other observations to the judge which he may think proper. In other cases, when sentence is about to be passed, the defendant may address the court in mitigation of punishment, as well as in arrest of judgment, whether he was tried and convicted or pleaded guilty; counsel however are not permitted to address the court, either in mitigation or aggravation of punishment, but the court will receive affidavits on either side, where the defendant pleads guilty, and there are no depositions. See *R. v. Gregory*, 1 *Car. & K.* 228. At sessions, indeed, where a prisoner has pleaded guilty, the court, when they are about to sentence him, frequently call upon the counsel for the prosecution to state the nature of the case against him; this, however, is not done at the assizes, but the judge collects the facts of the case from the depositions.

Where an offence, committed in a county or of a city or of a town, is tried at the assizes, the court may order the judgment to be executed, either in the same county, or in the county of the city or town in which the offence was committed. 51 *G. 3*, c. 100, s. 1; 14 & 15 *Vict.* c. 55, s. 23.

Sentence of death.] The principal offences now punishable with death, are, treason, murder, and unnatural offences. In

treason the sentence is, that the prisoner shall be drawn on a hurdle to the place of execution, and there hanged by the neck until he be dead, and that afterwards his head shall be severed from his body, and his body, divided into four quarters, shall be disposed of as Her Majesty shall think fit. 54 G. 3, c. 146, s. 1. But after sentence pronounced, Her Majesty, by warrant under her sign manual, countersigned by a secretary of state, may direct that the prisoner, instead of being drawn on a hurdle, shall be conveyed to the place of execution in such manner as is therein mentioned, and instead of being hanged, shall be beheaded, and may direct how his head and quarters shall be disposed of. *Id.* s. 2. A woman, for treason was formerly burnt; 2 *Hawk.* c. 48, s. 6; but now, she is to be drawn to the place of execution, and there hanged by the neck until she be dead. 30 G. 3, c. 48.

The punishment of principals and accessories before the fact in murder, is death. 9 G. 4, c. 31, s. 3. Formerly the prisoner must have been executed on the day but one after the passing of the sentence; and after being hanged, his body was to be dissected or hung in chains. *Id.* s. 4. But by stat. 2 & 3 W. 4, c. 75, the body was no longer to be dissected, but the judge, by his sentence might direct either that it should be hung in chains, or buried within the precincts of the prison. It was again altered by stat. 4 & 5 W. 4, c. 26, s. 1, which repeals so much of these Acts as relates to the hanging in chains. And now, by stat. 6 & 7 W. 4, c. 30, s. 2, sentence of death shall be pronounced, after convictions for murder, in the same manner, and the judge shall have the same power in all respects, as after convictions for other capital offences.

The crime of "buggery committed either with mankind or with any animal," is punishable with death. 9 G. 4, c. 31, s. 15. Formerly rape was punishable in the same manner. 9 G. 4, c. 31, s. 16; but now the punishment is by transportation for life. 4 & 5 *Vict.* c. 56, s. 3.

But in every case of a capital felony, except murder, if the court before whom the offender shall be convicted, shall be of opinion that under the particular circumstances of the case, such offender is a fit and proper subject to be recommended for the royal mercy, such court may, if it think fit, direct the proper officer, then present in court, to require and ask, and whereupon such officer shall require and ask, if such offender hath or knoweth anything to say, why judgment of death should not be recorded against such offender; and in case such offender shall not allege any matter or thing sufficient in law to arrest or bar such judgment, the court shall and may, and is hereby authorized, to abstain from pronouncing judgment of death upon such offender; and instead of pronouncing such judgment, to order the same to be entered of record, and thereupon such proper officer as aforesaid shall enter judgment

of death on record against such offender, in the usual and accustomed form, and in such and the same manner as is now used, and as if judgment of death had actually been pronounced in open court against such offender by the court. 4 G. 4, c. 48, s. 1.

As to the mode of proceeding, where the sentence of death is commuted for transportation, see 5 G. 4, c. 84, s. 2, or for imprisonment, see 11 G. 4 & 1 W. 4, c. 39, s. 7.

Sentence of transportation.] By stat. 5 G. 4, c. 84, Her Majesty, by and with the advice of her privy council, may from time to time appoint any place or places beyond the seas, either within or without her dominions, to which felons or other offenders under sentence or order of transportation shall be conveyed. And the sentence runs accordingly thus:—
“The sentence of the court is, that you be transported beyond the seas, to such place as Her Majesty, by and with the advice of her privy council, may direct and appoint, for the term of [your natural life,” or “— years”]. The statute by which the offence is punishable, mentions the term of transportation. But it is provided by stat. 9 & 10 Vict. c. 24, s. 1, that where the term of transportation is for life or some long term of years, or where imprisonment is to be for a term not less than two years, it shall be lawful, if the court shall think fit, to pass sentence of transportation for a less term (but not less than seven years), and to pass sentence of imprisonment for a less term than two years with or without hard labour.

Sentence of imprisonment.] By stat. 5 & 6 W. 4, c. 38, s. 4, whenever any person shall be convicted at any assizes or sessions, of any offence for which he or she shall be liable either to the punishment of death, transportation, or imprisonment, it shall be lawful for the court, if it shall so think fit, to commit such person to any house of correction for such county, in execution of the judgment. Or such prisoner may undergo his imprisonment in the common gaol of the county, &c., in which he is convicted. The court of Queen's Bench, indeed, when it passes sentence of imprisonment, may order the party to be imprisoned in any county in England, without reference to the place where the offence was committed; *Arch. Pr. Cr. Off.* 108; see *R. v. Garside*, 2 Ad. & El. 266; but this is not the case with courts of oyer and terminer or gaol delivery, or courts of quarter sessions.

The period of imprisonment for an offence by statute, is always mentioned in the statute; in what cases the sentence may be for a less term, see *stat.* 9 & 10 Vict. c. 24, s. 1 *supra*. For an offence at common law, however, the term is not limited; but the court seldom, even for offences the most aggravated, award a longer imprisonment than two years. And the

been already sentenced for another offence. *Wilkes v. R. in error*, 4 Bro. P. C. 367.

The court, in sentencing a defendant to imprisonment, might formerly have directed the prisoner to be kept in solitary confinement for the whole, or any portion of the time,—in all cases within stat. 7 & 8 G. 4, c. 29 (*Peel's Act, larceny*), by sect. 4,—in all cases within stat. 7 & 8 G. 4, c. 30 (*Peel's Act, malicious injuries*), by sect. 27,—in all cases within stat. 7 & 8 G. 4, c. 28, by sect. 9,—in all cases within stat. 11 G. 4 & 1 W. 4, c. 66 (*Forgery Act*), by sect. 26,—in all cases within stat. 2 W. 4, c. 34 (*Coin*), by sect. 19,—in all cases within stat. 8 & 9 Vict. c. 25 (*malicious injuries by fire, or explosive substances*), by sect. 11;—and in some other cases, which shall be mentioned under their proper titles. But by stat. 1 Vict. c. 90, s. 5, in all cases thereafter, it shall not be lawful to direct that any offender shall be kept in solitary confinement for any longer period than one month at a time, or three months in a year. Lastly, for all offences for which a woman, before stat. 1 G. 4, c. 57, might be sentenced to be whipped, the court may order her to be confined to hard labour for any time not exceeding six calendar months nor less than one month, or may pass sentence of solitary confinement for any time not exceeding seven days at any one time, in lieu of the sentence to be publicly or privately whipped. 1 G. 4, c. 57, s. 3.

Hard labour.] For all offences within stat. 7 & 8 G. 4, c. 28, for which imprisonment may be awarded, the court may sentence the offender either to be imprisoned only, or to be imprisoned and kept to hard labour, in the common gaol or house of correction, as to the court in its discretion shall seem meet. 7 & 8 G. 4, c. 28, s. 9. And the same, as to all the offences within stat. 7 & 8 G. 4, c. 29 (*Peel's Act, larceny*), by sect. 4,—as to all the offences within stat. 7 & 8 G. 4, c. 30 (*Peel's Act, malicious injuries*), by sect. 27,—as to all offences within stat. 11 G. 4 & 1 W. 4, c. 66 (*Forgery Act*), by sect. 26,—as to all offences within stat. 2 W. 4, c. 34 (*Coin*), by sect. 19,—as to all offences within stat. 8 & 9 Vict. c. 25 (*malicious injuries by fire, or explosive substances*), by sect. 11. So, a woman, instead of being whipped, may be sentenced to be confined to hard labour in the common gaol or house of correction, for any time not exceeding six months, nor less than one, in lieu of the sentence to be publicly or privately whipped. 1 G. 4, c. 57, s. 3.

Also, by stat. 3 G. 4, c. 114, hard labour, as well as imprisonment, may form part of the sentence upon persons convicted of any of the following misdemeanors:—any attempt to commit a felony,—any riot,—keeping a common gaming house, a common bawdy house, or a common ill-governed

and disorderly house,—and wilful and corrupt perjury and subornation of perjury (when punished by imprisonment). The statute mentions some other offences: but as far as it respects them it was repealed by stat. 7 & 8 G. 4, c. 27, s. 1, and 9 G. 4, c. 31, s. 1.

And lastly, by stat. 14 & 15 Vict. c. 100, s. 29, whenever any person shall be convicted of any one of the offences following, as an indictable misdemeanor; that is to say,—any cheat or fraud punishable at common law;—any conspiracy to cheat or defraud, or to extort money or goods, or falsely to accuse of any crime, or to obstruct, prevent, pervert, or defeat the course of public justice;—any escape or rescue from lawful custody on a criminal charge;—any public and indecent exposure of the person; any indecent assault, or any assault occasioning actual bodily harm;—any attempt to have carnal knowledge of a girl under twelve years of age;—any public selling, or exposing for public sale or to public view, of any obscene book, print, picture, or other indecent exhibition:—it shall be lawful for the court to sentence the offender to be imprisoned for any term now warranted by law, and also to be kept to hard labour during the whole or any part of such term of imprisonment.

There are also several other statutes, which specifically assign hard labour, as well as imprisonment, as a punishment for certain offences, which I shall have occasion to mention when I come to treat of those offences, in the course of the work.

Whipping.] Where imprisonment forms part of the punishment, male offenders may also be sentenced to be once, twice, or thrice publicly or privately whipped, if the court shall think fit, in the following cases:—for offences against stat. 7 & 8 G. 4, c. 28, by sects. 8, 11,—for most of the offences in stat. 7 & 8 G. 4, c. 29 (*Peel's Act, larceny*), and in stat. 7 & 8 G. 4, c. 30 (*Peel's Act, malicious injuries*), and for some of the offences in stat. 9 G. 4, c. 31 (*offences against the person*). By stat. 8 & 9 Vict. c. 25 (*malicious injuries by fire, or explosive substances*), it is enacted by sect. 9, that every male person under the age of eighteen years, who shall be convicted of any offence under this Act, or who shall be convicted of feloniously setting fire to any building, vessel, or mine, or to any stack or steer,—shall be liable, at the discretion of the court before which he shall be convicted, in addition to any other sentence which may be passed upon him, to be publicly or privately whipped in such manner and as often, not exceeding thrice, as the court shall direct. And as to larceny, or offences punishable as larceny, by juvenile offenders, we have seen (*ante*, p. 59) that they may be punished summarily by imprisonment, or imprisonment and hard labour, or fine, or if a male (not exceeding the age of fourteen years, 13 & 14 Vict. c. 37, s. 1),

by being once privately whipped, either instead of, or in addition to, such imprisonment, or imprisonment and hard labour. 10 & 11 Vict. c. 82, s. 1.

But sentence of whipping, public or private, shall not be passed upon a female, for any offence whatever; 1 G. 4, c. 57, s. 2; but instead thereof, the court or justice of the peace before whom they shall be tried or convicted, may pass sentence of confinement to hard labour in the common gaol or house of correction for any time not exceeding six months or less than one,—or of solitary confinement therein for any time not exceeding seven days at any one time,—in lieu of the sentence of being publicly or privately whipped. *Id.* s. 3.

Punishment for felony.] In most cases of felony, created or made punishable by statute, the statute states the punishment, and the sentence must accord with it. But there are, and may be hereafter, some offences made felony by statute, for which no punishment has been or may be specially provided; and in such cases the offender shall be liable, at the discretion of the court, to be transported beyond the seas for the term of seven years, or to be imprisoned (with or without hard labour, s. 9), for any term not exceeding two years, and if a male, to be once, twice, or thrice publicly or privately whipped (if the court shall think fit), in addition to such imprisonment. 7 & 8 G. 4, c. 28, s. 8.

As to the punishment for a subsequent felony:—by stat. 7 & 8 G. 4, c. 28, s. 11, if any person shall be convicted of any felony, not punishable with death, committed after a previous conviction for felony,—such person shall, on such subsequent conviction, be liable, at the discretion of the court, to be transported beyond the seas for life, or for any term not less than seven years, or to be imprisoned (with or without hard labour, s. 9), for any term not exceeding four years, and, if a male, to be once, twice, or thrice publicly or privately whipped (if the court shall think fit), in addition to such imprisonment.

Punishment for a misdemeanor at common law.] The punishment for a misdemeanor at common law, is by fine, or imprisonment, or both. I have already observed, *ante*, p. 182, that although for offences at common law, the term of imprisonment is not limited, yet the court, even for offences the most aggravated, seldom award a longer imprisonment than two years.

Sentence, where the party is in custody for another offence.] Wherever sentence shall be passed for felony on a person already imprisoned under sentence for another crime, it shall be lawful for the court to award imprisonment for the subse-

quent offence, to commence at the expiration of the imprisonment to which such person shall have been previously sentenced; and where such person shall be already under sentence either of imprisonment or transportation, the court, if empowered to pass sentence of transportation, may award such sentence for the subsequent offence, to commence at the expiration of the imprisonment or transportation to which such person shall have been previously sentenced, although the aggregate term of imprisonment or transportation respectively may exceed the term for which either of those punishments could be otherwise awarded. 7 & 8 G. 4, c. 28, s. 10.

Judgment amended.] A judgment pronounced by a court of oyer and terminer or gaol delivery, may be altered or amended by the judge, at any time during the same assizes; a judgment by a court of quarter sessions may be altered at any time during the same sessions; and a judgment of the court of Queen's Bench, at any time during the same term:—provided the sentence be not actually entered of record. See 2 Arch. Pr. 172. 2 Hawk. c. 48, s. 20. R. v. Fletcher, R. & Ry. 58. R. v. JJ. of Leicestershire, 1 M. & S. 442.

4. Costs.

In prosecutions for felonies.] The court before which any person shall be prosecuted or tried for felony, is hereby authorized and empowered, at the request of the prosecutor, or of any other person who shall appear on recognizance or *subpœna* to prosecute or give evidence against any person accused of any felony, to order payment to the prosecutor of the costs and expenses which such prosecutor shall incur in preferring the indictment,—and also payment to the prosecutor and witnesses for the prosecution of such sums of money as to the court shall seem reasonable and sufficient to reimburse such prosecutor and witnesses for the expenses they have severally incurred in attending before the examining magistrate or magistrates and the grand jury, and in otherwise carrying on such prosecution, and also to compensate them for their trouble and loss of time therein;—and although no bill of indictment be preferred, it shall still be lawful for the court, where any person shall, in the opinion of the court, *bonâ fide* have attended the court in obedience to any such recognizance or *subpœna*, to order payment unto such person of such sum of money as to the court shall seem reasonable and sufficient to reimburse such person for the expenses which he or she shall have *bonâ fide* incurred by reason of attending before the examining magistrate or magistrates,—and by

reason of such recognizance or *subpœna*,—and also to compensate such person for trouble and loss of time. 7 G. 4, c. 64, s. 22. Where the prosecutor and witnesses were bound over to prosecute and give evidence at the assizes as for a felony, but by the advice of counsel the indictment was preferred for a misdemeanor, in a case where costs were not allowed by the statute: upon application being made for costs, Williams, J., after taking time to consider, granted it. *R. v. Hanson*, 2 Car. & K. 912.

In prosecutions for misdemeanors.] Where any prosecutor or other person shall appear before any court, on recognizance or *subpœna*, to prosecute or give evidence against any person indicted of any assault with intent to commit felony,—of any attempt to commit felony,—of any riot,—of any misdemeanor, for receiving any stolen property, knowing the same to have been stolen,—of any assault upon a peace officer in the execution of his duty, or upon any person acting in aid of such officer,—of any neglect or breach of duty as a peace officer,—of any assault committed in pursuance of any conspiracy to raise the rate of wages,—of knowingly and designedly obtaining any property by false pretences,—of wilful and indecent exposure of the person,—of wilful and corrupt perjury, or of subornation of perjury,—[or unlawfully and carnally knowing and abusing any girl being above the age of ten years and under the age of twelve years,—unlawfully taking or causing to be taken any unmarried girl, being under the age of sixteen years, out of the possession and against the will of her father or mother, or of any other person having the lawful care or charge of her,—conspiring to charge any person with any felony, or to indict any person of any felony,—and conspiring to commit any felony; 14 & 15 Vict. c. 55, s. 2;—and in every case of assault, brought before justices of the peace for summary decision, under stat. 9 G. 4, c. 31, in which the justices shall be of opinion that the same is a fit subject for indictment, and shall thereupon bind the complainant and witnesses in recognizance to prosecute and give evidence at the assizes or sessions of the peace, *Id.* s. 3]: every such court is hereby authorized and empowered to order payment of the costs and expenses of the prosecutor and witnesses for the prosecution, together with a compensation for their trouble and loss of time, in the same manner as courts are hereinbefore authorized and empowered to order the same in cases of felony;—and although no bill of indictment be preferred, it shall still be lawful for the court, where any person shall have *bond fide* attended the court, in obedience to such recognizance, to order payment of the expenses of such person, together with a compensation for his or her trouble and loss of time, in the same manner as in cases of felony. 7 G. 4, c. 64,

s. 23. This statute, however, does not extend to cases where the indictment is removed by *certiorari* at the instance of the prosecutor, and afterwards tried on the civil side at the assizes. *R. v. Johnson et al.*, Ry. & M. 173. *R. v. Oates*, Ry. & M. 175. *R. v. Richards*, MS. Tr. 1828.

Costs of attending before the examining magistrate.] By stat. 7 G. 4, c. 64, s. 22, already noticed (*supra*), prosecutors and witnesses, in cases of felony, are to be allowed their expenses in attending before the examining magistrate or magistrates; and the section also enacts, "that the amount of the expenses of attending before the examining magistrate or magistrates, and the compensation for trouble and loss of time therein, shall be ascertained by the certificate of such magistrate or magistrates, granted before the trial or attendance in court, if such magistrate or magistrates shall think fit to grant the same:" the other expenses to be ascertained by the proper officer of the court. By that section, the magistrates' certificate was conclusive as to the amount of those expenses. But this is no longer so; for by stat. 14 & 15 Vict. c. 55, s. 6, the amount of such expenses shall also be ascertained by the proper officer of the court, but the amount thereof, as so ascertained, shall not exceed the amount mentioned in the certificate of the examining magistrate. So that now, it should seem, the prosecutor and witnesses are entitled to be allowed their expenses of attending before the examining magistrate, only in case such magistrate shall grant a certificate, and if granted, the amount therein allowed must be examined, and may be reduced on taxation, by the taxing officer of the court.

The 23rd sect. of stat. 7 G. 4, c. 64, above mentioned, which granted costs in certain cases of misdemeanors, contained a proviso, "that in cases of misdemeanor, the power of ordering the payment of expenses and compensation, shall not extend to the attendance before the examining magistrate." But this proviso is now repealed by stat. 14 & 15 Vict. c. 55, s. 1; and as by stat. 7 G. 4, c. 64, s. 23, the prosecutors and witnesses are entitled to their expenses in the cases of misdemeanor therein mentioned, "in the same manner as in cases of felony," they are now entitled to these costs of attending before the examining magistrate.

In prosecutions for offences at sea.] It shall be lawful for the judge of the court of Admiralty, [and for the judges of the Central Criminal Court, 4 & 5 W. 4, c. 36, s. 22, or judges of assize, and commissioners of oyer and terminer, 7 & 8 Vict. c. 2, s. 1], in every case of felony, and in every case of misdemeanor of the denominations hereinbefore enumerated, committed upon the high seas, to order the assistant to the counsel for the affairs of the Admiralty and navy, to pay such costs,

expenses, and compensation to prosecutor and witnesses, in like manner as other courts may order the treasurer of the county to pay the same.

In other cases.] Upon an indictment for a nuisance by a steam engine, it is enacted by stat. 1 & 2 G. 4, c. 41, that it shall be lawful for the court, by which judgment ought to be pronounced, in case of conviction upon any such indictment, to award such costs as shall be deemed proper and reasonable, to the prosecutor or prosecutors, to be paid by the party or parties so convicted as aforesaid, such award to be made either before or at the time of pronouncing final judgment, as to the court may seem fit.

In prosecutions for misdemeanors under stat. 12 & 13 Vict. c. 76 (*procuring the defilement of women*), the prosecutor and witnesses shall be allowed their expenses, in the same manner as in cases of felony. *Id.* ss. 2, 3.

In prosecutions for offences under stat. 14 & 15 Vict. c. 19, (namely, misdemeanors in being found at night, armed, with intent to break and enter a dwelling-house, or with implements of house-breaking, or disguised, or in a dwelling-house with intent to commit a felony,—or in inflicting grievous bodily harm with or without weapon,—or for felony, in using chloroform, &c., with intent to commit or assist another in committing a felony), the court may allow the expenses of the prosecution in all respects as in cases of felony. 14 & 15 Vict. c. 19, s. 14.

But in prosecutions for felonies and offences against the Queen and government, under stat. 11 Vict. c. 12, the court shall not order payment to the prosecutor or witnesses of any costs which shall be incurred in preferring or prosecuting the indictment. *Id.* s. 10.

Rewards, &c., for apprehending certain offenders.] By stat. 7 G. 4, c. 64, s. 28, where any person shall appear to any court of oyer and terminer, gaol delivery, superior criminal court of a county palatine [or court of quarter sessions, so far as respects offences which the sessions have power to try, 14 & 15 Vict. c. 55, s. 8,] to have been active in or towards the apprehension of any person charged with murder,—or with feloniously and maliciously shooting at or attempting to discharge any kind of loaded fire arms at any other person,—or with stabbing, cutting, or poisoning,—or with administering anything to procure the miscarriage of any woman,—or with rape,—or with burglary or felonious housebreaking,—or with robbery on the person,—or with arson,—or with horse stealing, bullock stealing, or sheep stealing,—or with being accessory before the fact to any of the offences aforesaid,—or with receiving any property knowing the same to have been stolen :

—every such court is hereby authorized and empowered, in any of the cases aforesaid, to order the sheriff of the county in which the offence shall have been committed, to pay to the person or persons who shall appear to the court to have been active in or towards the apprehension of any person charged with any of the said offences, such sum or sums of money as to the court shall seem reasonable and sufficient to compensate such person or persons for his, her, or their expenses and loss of time, in or towards such apprehension.

And if any man shall happen to be killed, in endeavouring to apprehend any person who shall be charged with any of the offences hereinbefore last mentioned, it shall be lawful for the court before whom such person shall be tried, to order the sheriff of the county to pay to the widow of the man so killed, in case he shall have been married, or to his child or children in case his wife shall be dead, or to his father or mother in case he shall have left neither wife nor child, such sum of money as to the court in its discretion shall seem meet. 7 G. 4, c. 64, s. 30.

What expenses, &c. allowed.] Formerly the justices at sessions were to make regulations as to the costs, expenses, and compensations to prosecutors and witnesses, by stat. 7 G. 4, c. 64, s. 26. But now that section is repealed by stat. 14 & 15 Vict. c. 55, s. 4; and by sect. 5 of the latter statute, it shall be lawful for one of Her Majesty's principal secretaries of state, to revoke any regulations made under the provision hereinbefore repealed, and to make regulations as to the rates or scales of payment of all or any costs, expenses, and compensations to be allowed or ordered to be paid, under the said Act or any other Act or this Act, to prosecutors and witnesses, and to persons attending the court in obedience to any recognizance or subpoena, in cases of criminal prosecutions,—and (except as hereinafter mentioned) to persons who may have been active in or towards the apprehension of persons charged with offences,—and also regulations as to the rates or scales of payment according to which certificates may be granted by the examining magistrate or magistrates in respect of the expenses of any prosecutor, or witness or witnesses for the prosecution, or other person, of attending before such magistrate or magistrates, and of any compensation for trouble and loss of time therein, in any case where any court or judge is empowered under the said stat. 7 G. 4, c. 64, or any other Act or this Act to order payment of such expenses or compensation,—and concerning the forms of such certificates and the details or particulars to be inserted therein of the expenses, trouble, and loss of time to which such certificates relate; and it shall be lawful for one of Her Majesty's principal secretaries of state from time to time to alter any such regulations,

or make new regulations in relation to any of the matters aforesaid, and such regulations for the time being shall be binding on all courts and persons whomsoever.

Costs taxed, and order for the same.] By stat. 14 & 15 Vict. c. 55, s. 6, in all cases where the expenses, &c. of prosecutors or witnesses shall be allowed,—and in all cases where the court shall order payment (except as hereinafter mentioned) to any person, who may appear to have been active in or towards the apprehension of any person charged with any offence, of compensation for expenses, exertions, and loss of time in or towards such apprehension,—the amount of such costs, expenses, or compensation shall be ascertained by the proper officer of the court, according to the regulations made under this Act;—and where the expenses and compensation in respect of attending before any examining magistrate or magistrates are so ordered to be paid, such expenses and compensation shall also be ascertained by the proper officer of the court according to such regulations, but the amount thereof as so ascertained shall not exceed the amount mentioned in the certificate of the examining magistrate or magistrates, and, save as aforesaid, the certificate of any examining magistrate or magistrates shall not be conclusive as to the amount to be allowed for expenses of attendance before him or them, or for compensation for trouble or loss of time therein.

By stat. 7 G. 4, c. 64, s. 24, the order for payment to the prosecutor or witness shall be forthwith made out and delivered by the proper officer of the court unto such prosecutor or witness, upon being paid the sum of one shilling for the prosecutor, and sixpence for each of the other persons, and in ordinary cases shall be made on the treasurer of the county, riding, or division in which the offence was, or is supposed to have been, committed. Or if the offence have been committed in a liberty, franchise, city, or town, not contributing to the payment of the county rate, it shall be paid out of the rate in the nature of a county rate, or out of any fund applicable to similar purposes, where there is such a rate, by the treasurer or officer having the collection or disbursement of the same; or where there is no such rate, it shall be paid out of the rate for the relief of the poor; and the order shall be directed accordingly. *Id.* s. 25. See *R. v. Treasurer of the Borough of Oswestry*, 12 *Shaw's J.P.* 73. And where a prisoner charged with having committed a capital offence in any town or place having exclusive jurisdiction, shall be committed to the county gaol for trial at the assizes, in pursuance of stat. 1 G. 4, c. 14, the expenses the county shall be put to by reason of such commitment shall also be paid by such town or place. 1 G. 4, c. 14, s. 3.

And in cases where an indictment for an offence committed in a county of a city, or of a town, is preferred at the assizes for the adjoining county, as mentioned *ante*, p. 64, the order for expenses of the prosecutor and witnesses, &c., shall be directed to the person who should have been ordered to pay the same if the prisoner had been prosecuted for the offence in such county of a city, &c.; 38 G. 3, c. 52, s. 3; 14 & 15 Vict. c. 55, s. 23; and an order to pay the expenses the county shall have incurred by reason of the removal of the prisoner there for trial, &c., shall be directed in like manner. 51 G. 3, c. 100, s. 2.

The order for payment of expenses, &c., to persons active in apprehending certain offenders, as above mentioned, is made out by the officer of the court; that made on the death of such person, is made by the court itself; in both instances the order is directed to the sheriff of the county, who pays the amount, and is repaid by the commissioners of the Treasury. 7 G. 4, c. 64, ss. 29, 30.

5. *Restitution of stolen Goods.*

As to goods, &c., obtained by larceny, embezzlement, or false pretences, or by knowingly receiving the same, the stat. 7 & 8 G. 4, c. 29, s. 57, "to encourage the prosecution of offenders," enacts, that if any person, guilty of any such felony or misdemeanor, in stealing, taking, obtaining, or converting, or in knowingly receiving any chattels, money, valuable security, or other property whatsoever, shall be indicted for any such offence, by or on behalf of the owner of the property or his executor or administrator, and convicted thereof,—the property shall be restored to the owner or his representative; and the court before whom any such person shall be so convicted, shall have power to award from time to time writs of restitution for the said property, or to order the restitution thereof in a summary manner: provided always, that if it shall appear before any award or order made, that any valuable security shall have been *bonâ fide* paid or discharged by some person or body corporate liable to the payment thereof, or being a negotiable instrument shall have been *bonâ fide* taken or received, by transfer or delivery, by some person or body corporate, for a just and valuable consideration, without any notice, and without any reasonable cause to suspect that the same had by any felony or misdemeanor been stolen, taken, obtained, or converted as aforesaid, in such case the court shall not award or order the restitution of such security. A bank of England note, which had been paid and cancelled, was holden to be within this latter proviso. *R. v. Stanton*, 7 Car. & P. 431.

6. *The Record.*

The following is the form of the record when made up :

Warwickshire } *Be it remembered that at* [&c., as in the
to wit. } *caption of the indictment, ante, pp. 76, 77 :*
then copy the indictment to the end. Then state the arraignment, &c., thus: *Afterwards to wit at the same sessions of the Lady the Queen of oyer and terminer [or sessions of the peace] holden as aforesaid on Friday the — day of —, in the — year of the reign aforesaid, the said A. B. being brought to the bar of the court here, and the indictment aforesaid being read unto him, and being demanded concerning the premises in the said indictment above specified whether he is guilty or not guilty thereof, saith that he is not guilty thereof, and thereof puts himself upon the country: therefore let a jury thereupon here immediately come before the said justices of the Lady the Queen, of free and lawful men of the county of Warwick aforesaid, by whom the truth of the matter may be the better known, and who are not of kin to the said A. B., to recognize upon their oath whether the said A. B. be guilty of the [felony and murder] in the said indictment aforesaid above specified, or not guilty: and the jurors of the said jury for this purpose by the sheriff of Warwickshire impanelled and returned, to wit G. H., [&c., stating the names of the jurors,] being called, come, who being elected, tried and sworn to speak the truth of and concerning the premises, upon their oath say that the said A. B. is guilty of the [felony and murder] aforesaid, on him above charged in manner aforesaid, as by the indictment aforesaid is above supposed against him: [And upon this it is forthwith demanded of the said A. B. if he hath or knoweth anything to say, wherefore the said justices here ought not upon the premises and verdict aforesaid to proceed to judgment and execution against him; who nothing further saith, unless as he before had said:] Whereupon all and singular the premises being seen, and by the said justices here fully understood, it is considered by the court here that the said A. B. [be taken to the gaol of the said Lady the Queen of the said county of Warwick, from whence he came, and from thence to the place of execution, and there be hanged by the neck until he be dead.*

Where there are two or more counts in the indictment, care must be taken in entering the verdict and judgment. Where an indictment against principal and receiver, contained two counts against the principal, one for stealing a bank note, and

the other for stealing a pocket book, and the receiver was charged with knowingly receiving them; and the principal was found guilty on the second count only, and the receiver found guilty "of the offence aforesaid," this was holden bad, for it was uncertain to which offence the finding referred. *R. v. Graham*, 1 *Leach*, 82; 2 *Haick. c.* 25, s. 72, n.; and see *R. v. Salamans*, 1 *T.R.* 149. So where there were two counts for felony in the indictment, and the jury process was to try whether the prisoner was guilty "of the felony aforesaid," and the verdict was, that he is guilty "of the felony aforesaid;" this was holden bad, for the word "felony" is not *nomen collectivum*. 10 *Shaw's J. P.* 327.

SECTION V.

Appeal to the Criminal Appeal Court.

The court and its judges.] The establishment of a criminal court of appeal, by stat. 11 & 12 Vict. c. 78, is the greatest improvement which has perhaps ever been made in the administration of our criminal law, so far as relates to indictable offences. It gives a defendant the full effect of a writ of error, speedily, and with little expense to either party; and the doubt or difficulty being pointed out by the judge who tried the case, affords the judges of the appeal court the best assurance they can have, that no frivolous objections will be submitted to them.

The judges of the court comprise the whole of the fifteen judges of the courts of common law at Westminster,—the justices of the court of Queen's Bench, the justices of the common pleas, and the barons of the exchequer. But by the 3rd section of the Act "the jurisdiction and authorities by this Act given to the said justices of either bench, and barons of the exchequer, shall and may be exercised by the said justices and barons, or five of them at the least, (of whom the Lord Chief Justice of the court of Queen's Bench, the Lord Chief Justice of the court of common pleas, and the Lord Chief Baron of the court of exchequer, or one of such chiefs at least, shall be part), being met in the exchequer chamber or other convenient place. 11 & 12 Vict. c. 78, s. 3.

Appeal, in what cases.] By stat. 11 & 12 Vict. c. 78, s. 1, "when any person shall have been convicted of any treason, felony, or misdemeanor, before any court of oyer and terminer or gaol delivery, or court of quarter sessions, the judge or commissioner or justices of the peace before whom the case shall have been tried, may, in his or their discretion, reserve any question of law, which shall have arisen on the trial, for

the consideration of the justices of either bench and barons of the exchequer;—and thereupon shall have authority to respite execution of the judgment on such conviction, or postpone the judgment until such question shall have been considered and decided, as he or they may think fit;—and in either case the court, in its discretion, shall commit the person convicted to prison, or shall take a recognizance of bail, with one or two sufficient sureties, and in such sum as the court shall think fit, conditioned to appear at such time or times as the court shall direct, and receive judgment, or to render himself in execution, as the case may be.” Although justices of the peace are alone mentioned here with reference to a court of quarter sessions, yet it has been holden that a recorder at a borough sessions may reserve a question for the opinion of the judges of this appeal court. *R. v. Masters*, 2 Car. & K. 930.

Under this section, the judge, justices, or recorder may reserve “any question of law, which shall have arisen upon the trial;” even a question upon the form of the indictment. *Vide infra*; and see *R. v. Webb*, 2 Car. & K. 933; *R. v. Martin*, *Id.* 950. So, a question which at the trial was made the subject of a motion in arrest of judgment, may be reserved. *R. v. Martin*, 2 Car. & K. 950. But the court, under this Act, have no authority to review the judgment given by any judge, justices, or recorder upon demurrer; *R. v. Faderman et al.*, 19 Law J. 147 m; indeed it is now declared, by a rule of this court, “that no case be heard upon any demurrer to the pleadings.” *Rule Tr. T. 13 Vict. 19 Law J. xv.*

Case] In order to obtain the opinion of the court of appeal “the judge or commissioner or court of quarter sessions shall state, in a case signed in the manner now usual, the question or questions of law which shall have been so reserved, with the special circumstances upon which the same shall have arisen; and such case shall be transmitted to the said justices and barons.” 11 & 12 Vict. c. 78, s. 2.

The case must briefly state the question or questions of law reserved, and such facts only as raise the question or questions submitted; if the question turn upon the indictment, or upon any count thereof, then the case must set forth the indictment, or the particular count. It must state, also, whether judgment on the conviction was passed, or postponed, or the execution of the judgment respited, and whether the person convicted be in prison or has been discharged on recognizance of bail to appear and receive judgment, or to render himself in execution. *Rule Tr. T. 13 Vict. 19 Law J. xv.*

The original case, signed by the judge, or commissioner, or chairman of sessions, and seventeen copies of the same, one for each judge, and one for each party, shall be delivered to the clerk of the court at the exchequer chamber, Westminster,

at least four days before the day appointed for the sitting of the court; and the fee thereon, payable to the clerks of the said judges, shall not exceed the fee payable on demurrer or other paper books [2s.] as contained in the table of fees allowed and sanctioned by the judges, pursuant to stat. 1 Vict. c. 30. *Rule Tr. T. 13 Vict. 19 Law J. xv.*

Also, when any case is intended to be argued by counsel or by the parties, notice thereof must be given to the clerk of the court, at least two days previously to the sitting of the court. *Rule Tr. T. 13 Vict. 19 Law J. xv.*

Hearing and judgment.] Upon the case being thus transmitted, "the said justices and barons shall have full power and authority to hear and finally determine the said question or questions,—and thereupon to reverse, affirm, or amend any judgment which shall have been given on the indictment or inquisition on the trial whereof such question or questions have arisen,—or to avoid such judgment, and to order an entry to be made on the record, that in the judgment of the said justices and barons the party convicted ought not to have been convicted,—or to arrest the judgment,—or order judgment to be given thereon at some other session of oyer and terminer or gaol delivery, or other sessions of the peace, if no judgment shall have been before that time given, as they shall be advised,—or to make such other order as justice may require. 11 & 12 Vict. c. 78, s. 2.

If the case be argued by counsel, they must confine themselves to the case as stated, and argue it upon the facts therein mentioned. *R. v. Smith*, 2 Car & K. 882. And if the judge, chairman, or recorder who reserved the case, shall have omitted any matter which may be deemed material, the counsel, before the case comes on for argument, should apply to him to insert it. *Id.*

Also, the judges shall have the power, if they think fit, to cause the case to be sent back for amendment; and thereupon the same shall be amended accordingly, and judgment shall be delivered after it shall have been amended. 11 & 12 Vict. c. 78, s. 4.

The "judgment or judgments of the said justices and barons shall be delivered in open court, after hearing counsel or the parties, in case the prosecutor or the person convicted shall think it fit that the case shall be argued, in like manner as the judgments of the superior courts of common law at Westminster are now delivered." 11 & 12 Vict. c. 78, s. 3.

Subsequent proceedings.] "Such judgment and order, if any, of the said justices and barons, shall be certified under the hand of the presiding chief justice or chief baron, to the

clerk of assize or his deputy, or to the clerk of the peace or his deputy, as the case may be, who shall enter the same on the original record in proper form; and a certificate of such entry, under the hand of the clerk of assize or his deputy, or the clerk of the peace or his deputy, as the case may be, in the form, as near as may be or to the effect mentioned in the schedule annexed to this Act, with the necessary alterations to adapt it to the circumstances of the case, shall be delivered or transmitted by him to the sheriff or gaoler in whose custody the person convicted shall be; and the said certificate shall be a sufficient warrant to such sheriff or gaoler, and all other persons, for the execution of the judgment, as the same shall be so certified to have been affirmed or amended, and execution shall be thereupon executed on such judgment,—and for the discharge of the person convicted from further imprisonment, if the judgment shall be reversed, avoided, or arrested, and in that case such sheriff or gaoler shall forthwith discharge him, and also the next court of oyer and terminer and gaol delivery or sessions of the peace shall vacate the recognizance of bail, if any;—and if the court of oyer and terminer and gaol delivery or court of quarter sessions shall be directed to give judgment, the said court shall proceed to give judgment at the next session.

The following is the form, given in the schedule to the Act, of the

Certificate of the Clerk of Assize or Clerk of the Peace.

Whereas at the session of the peace for the county of —, held on —, before — and others their fellows, [or at the session of oyer and terminer and gaol delivery held for the county of —, on —, before, among others, Sir A. B., knight, one of the justices of the court of — and — [here name the quorum commissioners,] justices of oyer and terminer and gaol delivery,] A. B., late of —, labourer, having been found guilty of felony, and judgment thereupon given, that [state the substance], the court before whom he was tried reserved a certain question of law for the consideration of the justices of either bench and the barons of the exchequer, and execution was thereupon respited in the meantime:

This is to certify, that the said justices and barons having met in the exchequer chamber at Westminster, on the — day of —, it was considered by the said justices and barons there that the judgment aforesaid should be annulled, and an entry made on the record, that the said A. B. ought not, in the judgment of the said justices and barons, to have

been convicted of the felony aforesaid; and you are therefore hereby required forthwith to discharge the said A. B. from your custody.

To the gaoler of —, and the sheriff of —, and all others whom it may concern.

(Signed) E. F.

*Clerk of the peace for the county of —,
[or, Clerk of assize for —,
as the case may be].*

And to prevent any fraud being practised, for the purpose of getting the prisoner discharged by means of a forged or altered certificate, it is enacted, "That every person who shall forge or alter, or shall offer, utter, dispose of, or put off, knowing the same to be forged or altered, any certificate of or copy certified by a chief justice,—or any certificate of or copy certified by a clerk of assize or his deputy, or the clerk of the peace or his deputy, as the case may be,—with intent to cause any person to be discharged from custody, or otherwise prevent the due course of justice,—shall be guilty of felony, and being convicted thereof shall be liable, at the discretion of the court, to be transported beyond the seas for any term not exceeding ten years, or be imprisoned for any time not exceeding three years, with or without hard labour and solitary confinement, both or either, at the discretion of the court before which he shall be tried. 11 & 12 Vict. c. 78, s. 6.

SECTION VI.

Writ of Error.

In what cases.] After judgment given against a defendant upon an indictment at the assizes or quarter sessions, if the indictment be bad in substance, or the judgment be erroneous, or any other defect in substance appear upon the face of the record, the defendant may have the judgment reversed by the court of Queen's Bench, by writ of error; or where his property, real or personal, is forfeited by the judgment, the writ of error may be brought after his death, by his heir or personal representative respectively. 2 Hawk. c. 50, s. 11. See 2 Bac. Abr. Error, A. 1, 2. And in ordinary cases, it is the only way in which the judgment can be reversed, *Rice's case*, Cro. Jac. 404. *R. v. JJ. of W. R. Yorkshire*, 7 T. R. 467. 9 Vin. Abr. Error, D., except upon appeal, as mentioned in the last section. But if the judgment be given by persons who have no jurisdiction in the matter, as where a commission authorizes an indictment to be taken before A., B., C. and twelve others, and by colour thereof the commissioners proceed on an indictment taken before eight persons only, there

the books say that the judgment may be falsified, by showing the special matter, without writ of error, because it is void; 3 *Inst.* 231. 2 *Hawk. c.* 50, s. 3. 4 *Bl. Com.* 390, 391; which appears to me to mean, that upon the record being brought before the court of Queen's Bench by *certiorari*, that court, upon a statement of the special matter on affidavit, uncontradicted, will quash the whole proceeding. Or, if such matter appear upon the face of the record, the judgment may be reversed upon writ of error. 2 *Bac. Abr. Error*, A. 1.

But judgment must have been given, otherwise a writ of error will not lie. And therefore formerly, where a man was indicted for felony and found guilty, and he prayed his clergy, which was allowed to him, he could not afterwards have a writ of error; for he was convicted only, not attainted. *Long's case*, *Cro. Eliz.* 489. 2 *Bac. Abr. Error*, A. 2. *Vin. Abr. Error*, C.

And the judgment must have been upon an indictment; for no writ of error will lie upon a mere summary conviction; *Anon. Vent.* 98. *Anon. Id.* 171. *Berry's case*, 2 *Jon.* 167. *Vin. Abr. Error*, D. 2 *Bac. Abr. Error*, A.; not even upon a conviction of forcible entry by justices of the peace upon view; *Anon. Vent.* 171; nor in any other case.

And it must be a judgment against the defendant; 3 *Inst.* 214. 2 *Bac. Abr. Error*, A. 1; for there is no instance of error being brought upon a judgment for a defendant after an acquittal.

If the indictment be against two, and judgment against both, error may be brought by either, but it must be in the names of both; but if upon an indictment against two, judgment be against one only, then he may bring error in his own name alone.

Attorney-general's fiat.] Before a writ of error in a criminal case, however, is sued out, the attorney-general's fiat for it must first be obtained. 2 *Hawk. c.* 50, s. 13. First, therefore, obtain a certificate from counsel that there is error in the record; and upon producing that, and a verified copy of the indictment or record to the attorney-general, he usually grants his fiat for the writ of error. This is granted as a matter of course in misdemeanors, upon sufficient cause being shown for it; but in cases of felony, it is granted only *ex gratia*. 4 *Bl. Com.* 392. See *Com. Dig. Error*, A. *Gargrave's case*, *Ro. Rep.* 175. *Vin. Abr. Error*, F.

The writ, and return.] There seems to be two modes of proceeding, either of which the party may adopt at his option: he may bring the writ of error directed to the judges, justices, or recorder, who pronounced the judgment, and have the record returned to the court of Queen's Bench under and by

virtue of it; or he may have the record removed into the court of Queen's Bench by *certiorari*, and then bring a writ of error *coram nobis* upon it. *R. v. Foxley*, 1 *Salk.* 266. 3 *Com. Dig. Error, B.* The former, however, seems to be the most approved mode of proceeding. Upon producing the *flat* for the writ at the petty bag office, the clerk there will make out the writ. Deliver the writ then to the clerk of assize (if the trial were at the assizes), or to the clerk of the peace (if the trial were at sessions), and he will make a return to it. For this purpose he must get the record made up, and engrossed on parchment; *see the form, ante*, p. 193. He then indorses the writ thus: "*The record and proceedings, whereof mention is within made, appear in a certain schedule to this writ annexed. The answer of the commissioners [or justices, or recorder], within named.*" He then annexes the record to the writ, and transmits it to the crown office.

Bail.] In cases of misdemeanor, the defendant, in order to stay execution of the judgment, or, if in custody, to be set at liberty, pending the writ, may enter into recognizance, with two sufficient sureties, before any judge of the court of Queen's Bench, or any commissioner for taking bail in the country, in such sum as the judge or commissioner shall direct, conditioned to prosecute the writ of error with effect, and, in case the judgment shall be affirmed, forthwith to render the defendant to prison according to the judgment, if imprisonment be adjudged. 8 & 9 *Vict. c. 68, s. 1.* If the defendant be under disability, then a recognizance with two sufficient sureties shall be taken. *Id.* The sureties justify, &c., in the same manner as in civil actions. *Id.*

Upon the recognizance being transmitted to the crown office of the court of Queen's Bench, the clerk there will give a certificate thereof to the defendant's agent, which, being duly verified by affidavit made before one of the judges of any of the superior courts of common law, or a commissioner, shall be a sufficient warrant to the gaoler to discharge the defendant, or, if a fine have been levied, to authorize the person having the amount, to repay it to the defendant. *Id. s. 2.*

If judgment be affirmed, and imprisonment were adjudged, then, if the defendant had been imprisoned any time under the judgment at the time he was discharged, he shall be imprisoned for the remainder of the time only, which was adjudged. *Id. s. 3.*

Assignment of errors.] As soon as the writ is returned, and the return filed, get the assignment of errors drawn and signed by counsel, engross it on paper, and, in misdemeanors, file it in the crown office; but in cases of felony, the defendant must appear in court, and assign errors in person.

It may be necessary to mention, that in cases of misdemeanor, if at this or any other stage of the proceedings, the court of error, upon motion, decide that the defendant has wilfully delayed or neglected to prosecute the writ of error with effect, they may order the writ to be quashed; and thereupon the defendant will be liable to execution on the judgment. 8 & 9 Vict. c. 68, s. 5.

Joinder in error.] After filing the assignment of errors, let the plaintiff in error obtain a side bar rule to join in error, and serve it, together with a copy of the assignment, on the prosecutor or his attorney; and if he do not file a joinder in error within eight days after service of the rule, the plaintiff in error may sign judgment as for want of a joinder, at the opening of the office on the morning of the ninth day, unless an order of the court or of a judge, extending such time, shall have been obtained and served, and in such case judgment shall not be signed until the day after the expiration of the time granted by such order. *Reg. Cr. Off.* 17, 18.

The prosecutor, within the time here mentioned, must get his joinder in error drawn, engrossed on paper, and signed by counsel, and must file it at the crown office.

Argument, &c.] Upon the joinder in error being filed, either party may obtain a rule for a concilium at the crown office, and serve it on the opposite party; and then the case is set down in the crown paper for argument. The rule specifies the day for which the case will be put into the paper, and must be drawn up and served six days at least before such day within forty miles of London, or within eight days in other cases. *Reg. Cr. Off.* 21. But in all cases where the defendant is in prison, or otherwise undergoing his sentence, the court upon application on his behalf, will in general fix some early day in the term for the argument, and a rule must be drawn up accordingly, which must be served on the prosecutor or his attorney.

Paper books are then delivered by the parties respectively to the judges, and the case argued, as in ordinary cases upon a demurrer; and the court then deliver their judgment.

Judgment, &c.] The judgment of the court of error is either that the judgment of the court below be affirmed, or, *quod cassetur*. If it be affirmed, the court will remand the defendant to his former custody, in order that he may undergo his punishment. If it be reversed, then by stat. 11 & 12 Vict. c. 78, s. 5, it shall be competent for the court of error either to pronounce the proper judgment, or to remit the record to the court below, in order that such court may pronounce the proper judgment upon such indictment, &c.

This latter provision seems to have reference only to cases, where the error is in the judgment itself; as where the judgment is for ten years' transportation, where by law it should only be for seven; or where the judgment is for transportation, where by law the offence is punishable with imprisonment only; or the like. Formerly, in such a case, where the judgment was reversed, the court had no power to pronounce any other judgment but merely that of reversal, and the defendant was consequently discharged. *R. v. Bourne et al.*, 7 *Ad. & El.* 58.

Where an outlawry is reversed for error, the party is put to plead to the indictment. 2 *Hawk. c.* 50, *s.* 18.

SECTION VII.

Execution.

Death.] If sentence of death be passed by a court of oyer and terminer or gaol delivery in the country, the sheriff of the county or city for which the assizes are holden must execute the sentence, within such county or city, and not elsewhere. The only exception to this is, where the record and prisoner have been removed into the court of Queen's Bench, which I shall notice presently, and where a prisoner, for a capital offence committed in the county of a city or town, is tried and convicted in the adjoining county; in the latter of which cases, the judge may order the judgment to be executed either in the same county in which the prisoner was tried, or in the county of the city, &c. in which the offence was committed. 51 *G.* 3, *c.* 100, *s.* 1. 14 & 15 *Vict. c.* 55, *s.* 23. The judge however may order him to be imprisoned, until execution, in any house of correction, provided it be within the county, &c., for which the assizes are holden. 5 & 6 *W.* 4, *c.* 38, *s.* 4.

The court of Queen's Bench, however, has power to award execution, not only against those who are attainted or sentenced there, but also against persons attainted in parliament, or any other court of record, the record of their attainder or a transcript thereof being first removed there, and the party brought thither by *habeas*. 2 *Hawk. c.* 51, *s.* 1. And in a case not very long since, where the sheriff of Chester refused to execute certain persons for murder, the attorney-general moved for a *habeas corpus* and *certiorari*, to bring up the prisoners and the record of their conviction; and the court held that he was entitled to the writs, as of course. *R. v. Garside*, 2 *Ad. & El.* 266. In the same case, on the prisoners being brought up and the record removed, the court gave them three days' time, to examine the record, and to instruct counsel to show

cause why execution should not be awarded against them.

Id. And afterwards, the prisoners insisting on having the benefit of a free pardon, which had been promised by a proclamation, and which the court held could not be pleaded as a pardon, the court in their discretion deferred awarding execution, until the prisoners should have time to apply to the secretary of state for a pardon, according to the terms of the proclamation. *Id.* A rule of the court was afterwards made for their execution in the county of Surrey (the county in which the prison of the court was situate), by the marshal of the Marshalsea, assisted by the sheriff of Surrey, and they were executed accordingly: for the court of Queen's Bench, by law, has authority to order the sheriff of any county in England or Wales, to carry into execution their sentence, or the sentence of any other court, even a sentence of death, where the record and prisoner have been removed there. *R. v. Garside, supra.* And they may order this without writ: 2 *Hawk. c. 51, s. 4*: they usually do it by a rule of the court; in the central criminal court, the judgment is executed under a warrant from the recorder; but in the country, where the trial has been at the assizes, there is nothing more than a mere memorandum of the sentence, written opposite to the name of the prisoner in the calendar or list of prisoners, which is signed by the judge, as a warrant to the sheriff to execute the prisoner. 4 *Bl. Com.* 403, 404. In the rule of the court of Queen's Bench, and in the warrant of the recorder of London, the time of the execution is specified; but it is not so at the assizes; the judge however usually reprieves the prisoner for a certain time, (for every court, having the power to award execution, has a discretionary power of granting a reprieve, 2 *Hawk. c. 51, s. 8*,) but as soon as that time has expired, or where there is no reprieve, the sheriff may execute the party at such time as he may deem most convenient. As the sentence is, that the defendant shall be hanged by the neck until he be dead,—if he be hanged, but come to life afterwards, he must be hanged again; for the judgment is not executed, until he is dead. 2 *Hawk. c. 51, s. 7*.

If a woman, when condemned to death, be quick with child, she may allege the fact, in order to have the execution respited until after her delivery; and thereupon the sheriff shall be ordered to impanel a jury of matrons to examine her in a private room, to try the fact, and if they find that she is quick with child, her execution shall be respited until her delivery. 2 *Hawk. c. 51, ss. 9, 10*.

In the case of murder, the prisoner, after conviction, must be kept apart from the other prisoners, fed on bread and water only (unless in the case of sickness or wound the surgeon order to the contrary); and no person shall have access to him but the gaoler and his servants, the chaplain and the sur-

geon of the prison, without the written permission of the judge, or the sheriff or his deputy. 9 G. 4, c. 31, s. 6. And when executed, he must be buried within the precincts of the prison. 2 & 3 W. 4, c. 75. *See ante*, p. 181.

Transportation.] Her Majesty, by warrant under her sign manual, may appoint places of confinement within England or Wales, either at land, or on board vessels in the river Thames or some other river, or port, or harbour, for the confinement of male offenders under sentence or order of transportation; 5 G. 4, c. 84, s. 10; where they may be kept to hard labour; *Id.* s. 18; and the time of such confinement shall be reckoned in discharge or part discharge of the term of their transportation. *Id.* s. 19. And they may be sent for that purpose to any of Her Majesty's penitentiaries in Great Britain. 10 & 11 Vict. c. 67. But where an order for the transportation of any convict, male or female, shall be delivered to the sheriff or gaoler, he shall forthwith remove him or her to the ship employed for the purpose, and there deliver the offender to the contractor, together with a copy (attested by the sheriff or gaoler) of the caption and order of the court, and its sentence or order for transportation, and a certificate of his crime, his age, trade, &c., temper, disposition, and his behaviour whilst in prison; and the contractor shall give the sheriff or gaoler a receipt for his discharge. 5 G. 4, c. 84, s. 4. *And see the rest of that Act, and stat.* 11 G. 4 & 1 W. 4, c. 39.

Imprisonment.] By stat. 5 & 6 W. 4, c. 88, s. 4, where any person shall be convicted at any assizes or sessions for an offence for which he shall be liable to the punishment of imprisonment, transportation, or death, it shall be lawful for the court (if it shall so think fit) to commit him to any house of correction for such county, in execution of his judgment. Or, in cases at the assizes, he may be, and usually is, committed to the county gaol. In cases where, for an offence committed in the county of a city or town, the offender is tried and convicted at the assizes for the adjoining county, and judgment of imprisonment is passed upon him, the judge may order such judgment to be executed, either in the same county, or in the county of the city, &c., in which the offence was committed. 51 G. 3, c. 100, s. 1. 14 & 15 Vict. c. 55, s. 23. In what cases hard labour or solitary imprisonment may be inflicted, *see ante*, p. 183.

In other cases.] In cases of forcible entry, if the force be continuing, or the prosecutor expelled, part of the judgment is that the prosecutor have restitution of his premises. In case of a public nuisance, if it be continuing, part of the judgment is that it be abated. And if an offender be adjudged to

pay a fine, and also to be imprisoned, then, although he is imprisoned, the fine may be levied also, if he have any property upon which to levy it. But it is very doubtful whether a court of quarter sessions, or even a court of oyer and terminer or gaol delivery, have authority to issue writs for the execution of these judgments. The court of Queen's Bench has: a fine may there be levied by writ of *levari facias* against the inhabitants of a parish, &c., or by writ of *feri facias* against an individual; *Arch. Pr. Cr. Off.* 111, and see the forms of those writs, *Id.* 112, 113; a nuisance may be abated, by writ *de nocumento amovendo*, *Id.* 111, and see the form of the writ, *Id.* 113; and a writ of restitution may be awarded in the case of a forcible entry, *Id.* 111, and see the form of the writ, *Id.* 114. Where it is necessary, therefore, to issue any of those writs, in execution of the judgment, it is best to remove the record into the court of Queen's Bench by *certiorari*, and you may then sue out execution as of course.

PART II.

Indictments and Evidence in particular Cases.

I propose to arrange these indictments under the following heads :—

Chapter 1. *Offences against Individuals.*

2. *Offences against the Queen and her Government.*
3. *Offences of a public Nature.*
4. *Conspiracy.*
5. *Offences after a former Conviction.*
6. *Attempts to commit Offences.*

CHAPTER I.

*Offences against Individuals.*Section 1. *Offences against the Persons of Individuals.*

2. *Offences against their Reputation.*
3. *Offences against their Habitations.*
4. *Offences against their Property, by stealing, embezzling, cheating, or receiving.*
5. *Offences against their Property, by malicious Injuries.*
6. *Forgery.*

SECTION I.

*Offences against the Persons of Individuals.*1. *Murder.**Indictment.*

— } The jurors for our Lady the Queen upon their
to wit. } oath present, that A. B., on the — day of —,
in the year of our Lord —, feloniously, wilfully, and of his
malice aforethought did kill and murder one C. D.; against
the peace of our Lady the Queen, her crown and dignity.

Death. 9 G. 4, c. 31, s. 3.

By stat. 14 & 15 Vict. c. 100, s. 4, in any indictment for murder or manslaughter "it shall not be necessary to set

forth the manner in which, or the means by which, the death of the deceased was caused, but it shall be sufficient in every indictment for murder to charge that the defendant did feloniously, wilfully, and of his malice aforethought kill and murder the deceased, and it shall be sufficient in every indictment for manslaughter to charge that the defendant did feloniously kill and slay the deceased."

The name of the deceased should be stated, if it be known; if not known, he may be described as "a certain person to the jurors aforesaid unknown." Ante, pp. 79, 80. But where a woman was indicted for murdering her illegitimate child immediately after its birth, and in the indictment it was neither described by any name, nor as a child whose name was to the jurors unknown; and an objection on this ground was made in arrest of judgment: Coleridge, J. held the indictment to be correct; the child being illegitimate, could have no name but by reputation, and it could not have acquired that at the time of its death; and to state in the indictment that its name was to the jurors unknown, was assuming that it had a name; R. v. Willis, 1 Car. & K. 722; and this decision was afterwards confirmed by the judges. Id. Describing the child, in such a case, as "not named," would be sufficient. R. v. Waters, 2 Car. & K. 864. Where a woman of the name of Stroud, was indicted for the murder of her illegitimate child, which in the first count was called "Harriet Stroud," and in the second described as "a female of tender age, whose name is to the jurors aforesaid unknown;" the evidence was that the child was baptized by the name of Harriet, and not Harriet Stroud: the prisoner was found guilty; but the case being reserved for the opinion of the judges, they held that she ought not to have been convicted on either count;—not on the first count, because the child's name was not proved to be Harriet Stroud; and not on the second, because the child had a name, "Harriet," by which it might have been described in the indictment. R. v. Stroud, 1 Car. & K. 187. In a similar case, where an illegitimate child, four months old, had not been baptized, but was generally called "William," and spoken of as Sarah Scarborough's child, and on one or two occasions was called "William Scarborough" in his mother's presence: this was holden to be sufficient evidence to go to the jury, of the child having acquired that name by reputation. R. v. Scarborough, 12 Shaw's J. P. 265. As to the venue, see ante, p. 68.

In the case of murder committed abroad, the indictment states that "A. B. being a subject of our Lady the Queen, on the — day of —, in the year of our Lord —, on land, out of the United Kingdom of Great Britain and Ireland, to wit, at [Boulogne, in the Kingdom of France], feloniously,

wilfully, and of his malice aforethought, &c., *see stat. 9 G. 4, c. 31, s. 7, and ante, p. 66; and see R. v. Azzopardi, 1 Car. & K. 203.* As to the venue, *see ante, p. 66.*

In the case of murder at sea, the offence is alleged to have been committed "on the high seas." See 7 & 8 Vict. c. 2, s. 1, ante, p. 66. It is not necessary to allege that it was committed within the jurisdiction of the Admiralty; R. v. Jones et al., 2 Car. & K. 165; nor need the indictment conclude "Contra formam statuti." R. v. Serva et al., 2 Car. & K. 58. As to the venue, see ante, p. 66.

Evidence.

To support this indictment the prosecutor must prove—

1. That the prisoner killed the deceased. Lord Hale (2 *Hale*, 200) lays it down as a general rule, never to convict a person of murder, unless the body have been found. And where a girl was indicted for the murder of her illegitimate child, and the evidence was that about six o'clock in the evening she was seen with the child, going in the direction from the place where she had been in service towards her father's, that she arrived between eight and nine at the father's without the child, and that the body of a child was found in a tide river near which she must have passed, but there was no evidence to show that it was her child, and the evidence rather tended to prove that it was not: Lord Abinger, C. B., ruled that as there was no evidence to show that the girl's child was actually dead, she must be acquitted; she could not be called upon to show what had become of it. *R. v. Hopkins, 8 Car. & P. 591.* But where the indictment was for murder of a captain of a ship by a seaman on the high seas, and a witness proved that being on board of the ship, and hearing a violent noise on the deck, he came up, and he then saw the prisoner take the captain up and throw him into the sea, and that he was never seen or heard of afterwards; and that on the deck, near to where this happened, a billet of wood was found, and the deck and part of the prisoner's dress was stained with blood: this was left to the jury as evidence of the killing, and they found the prisoner guilty, and (the conviction being approved of by the judges) he was executed. *R. v. Hindmarsh, 2 Leach, 569.*

It is of little matter by what means the death was effected:—whether by poisoning,—or shooting,—stabbing, cutting, or wounding,—whether with a deadly weapon, or with a stick or flint,—or by drowning, suffocating, or strangling, or the like. So if a man deliberately do a thing, calculated to endanger the life of another, and it causes his death, he is guilty of homicide: 1 *Hawk. c. 31, s. 4*: as where a gaoler, knowing

that a prisoner ill with the small pox lodged in a certain room, confined another person in the same room against his will; and the second prisoner caught the disease, and died of it: this was holden to be homicide in the gaoler. *Fost.* 322. So where a gaoler put a prisoner into a room, the walls of which were damp and unwholesome, and kept him thus confined, without fire, and without the convenience of chamber pot, &c., for forty-four days, by which the prisoner contracted an ill habit of body, which brought on disease, of which he died: this was holden to be homicide in the gaoler. *R. v. Huggins et al.*, 2 *Str.* 882. So if spirits be given to a child, in such a quantity as to be quite unfit for its tender age, whereby the child is killed; *R. v. Martin*, 3 *Car. & P.* 211; *per Vaughan, B.*; or inducing an adult to drink such a quantity of spirits as kills him; *see R. v. Packard et al.*, *Car. & M.* 236; if a man give medicine to a woman to procure abortion, or use instruments for the purpose, and the woman is thereby killed, 1 *Hale*, 429; *Tinkler's case*, 1 *East, P. C.* 220, 354, or the child, by being born before its time, dies: *R. v. West*, 2 *Car. & K.* 784: in all these cases, the offending party will be guilty of homicide. Where a woman, being delivered of a child, left it in an orchard, covered only with a few leaves, and a kite struck it and killed it, this was holden to be homicide in the mother. 1 *Hawk. c.* 31, *s.* 6. So, where a woman was delivered of a child on the high road, and after carrying it some way, she left the child naked and exposed, on the road side, where it died, this was holden to be homicide. *R. v. Walters*, *Car. & M.* 164; and *see R. v. Waters*, 2 *Car. & K.* 864. So, where a son carried his sick father from one town to another, in a frosty morning, against his will, by reason whereof he died, this was holden to be homicide in the son. 1 *Hale*, 431, 432. 1 *Hawk. c.* 31, *s.* 5. So, if a parent, or person *in loco parentis*, cause the death of the child, or a master cause the death of his apprentice, by beating, ill using, or wilfully overworking him, *R. v. Cheeseman*, 7 *Car. & P.* 454; *Self's case*, 1 *East, P. C.* 226, or by depriving it of sufficient nourishment, *R. v. Squires*, 1 *Russ.* 16, 426; *R. v. Bubb*, 14 *Shaw's J. P.* 562, or by other cruelty or ill treatment. *Self's case, supra*: it is homicide. But a married woman cannot be charged with the death of a child, by not providing it with proper food, unless it be proved that her husband furnished her with the means of providing the food; *R. v. Squires, supra*; *R. v. Saunders*, 7 *Car. & P.* 277; but otherwise, if the child be an infant, and the death be occasioned by not suckling it, when the mother was capable of doing so. *R. v. Edwards*, 8 *Car. & P.* 611. Where a man was indicted for the murder of an aged woman, whom he had undertaken for certain considerations to support, and who had died in his house for want of necessary food and nourish-

ment, *Patteson, J.*, held that he was guilty of homicide. *R. v. Marriott*, 8 *Car. & P.* 600. So, if a man do any other act, which is the primary or proximate cause of another's death, he is guilty of homicide. As, where a man gave a woman a blow on the head with a pewter pot, and wounded her, but not dangerously; the wound however produced erysipelas, of which the woman died: this was deemed homicide, and of the same degree as if the wound had caused the death. *R. v. Freeman*, 1 *Russ.* 518; and see *R. v. Huggins et al.*, *supra*. So if a man hurt another, who dies of it, it is no excuse to say that he would not have died if he had taken proper care of himself; 1 *Hawk. c.* 31, *s.* 10; *Rew's case*, *Kel.* 26; or that neglect, or the want of proper applications to the wound, had brought on gangrene or fever, and of that he died. 1 *Hale*, 428. So if a man be labouring under a disease, of which he is likely or certain shortly to die, yet if his death be accelerated by a hurt received from another, that is as much homicide as if the man were in perfect health, and his death were caused by the hurt alone. 1 *Hale*, 428. *R. v. Martin*, 5 *Car. & P.* 128. *R. v. Webb*, 1 *Mo. & R.* 405. If a man by violence or threats terrify another so much, that he does an act which is the cause of his death, this is homicide in the threatening party. Where a woman fell from a window and was killed, her husband was beating her at the time, and it was doubtful whether he had not thrown her out of the window; or whether she had not thrown herself out, terrified by his threats of further violence: *Heath, Gibbs, and Bayley, JJ.*, were of opinion that if, owing to his threats of further violence, she threw herself from the window from a well grounded apprehension of his doing such violence to her as would endanger her life, the husband was as much answerable for the fall, as if he himself had thrown her out of the window. *R. v. Evans*, 1 *Russ.* 488. So, if a man, from a well grounded apprehension of violence from the threats or acts of another, throw himself into a river, and be accidentally drowned, it is as much homicide as if the other had thrown him in. See *R. v. Pitts*, *Car. & M.* 284. So, where A. hit B. with a stick, and both being on horseback, B. rode away, and A. pursued him, and B. thereupon spurred his horse, and the horse winced and threw him, and he was killed: *Park, J.*, held that this was homicide in A. *R. v. Hickman*, 5 *Car. & P.* 151. But if a person die with terror or apprehension of the threats held out by another, this is not homicide. 1 *Hale*, 427, 429. If a man make use of a living, but irresponsible agent to effect the death of another, as if a man persuade an idiot to kill another, and he do it, the man, not the idiot, is guilty of the homicide. 1 *Hawk. c.* 31, *s.* 7. Where a woman was indicted for the murder of her child, and it appeared that she gave a bottle of laudanum to the woman who had the care of it, with directions

to give it a teaspoonful every night ; the woman in fact did not give it to the child, but having placed the bottle on the mantel piece, another child found it there, and administered part of the contents to the prisoner's child, who soon after died : the judges held that the administering the poison, by the other child, was in point of law, under the circumstances of the case, as much an administering of it by the prisoner, as if the prisoner had actually administered it with her own hand. *R. v. Catherine Michael*, 9 Car. & P. 356. So, if a man have a wild or unruly beast, which he knows would hurt persons, and he purposely let it loose, either with a design that it may injure some person, or even to frighten people and make sport, and it kill a man, the man who let it loose will be guilty of the homicide. 1 Hale, 431. If a man ride a horse, used to kick, amongst a crowd, even although merely to frighten the persons there and make sport, and the horse kick a man, and kill him : this is homicide in the rider. 1 Hawk. c. 31, s. 68. Nor does the law require that the homicide should be committed against the will of the party killed ; for if a man kill another with his consent, or by his desire, he is as much guilty of homicide as if he had killed him against his will. *Sawyer's case*, 1 Russ. 485. But it has been holden that a man cannot be convicted of homicide, in procuring another to be executed, by charging him falsely with a crime, of which he knew him to be innocent. *R. v. Macdaniel*, 1 East, P. C. 333, s. 94.

But an infant in the womb, although alive, cannot be the subject of homicide,—unless where, after being injured in the womb, it is afterwards born alive, but dies of the injuries it before received ; as where a child dies after birth, by reason of something given or act done to the mother to procure abortion, 2 Hawk, c. 31, s. 16, or in consequence of its being prematurely brought forth, upon such abortion being effected. *R. v. West*, 2 Car. & K. 784. *Ante*, p. 200. But otherwise, unless the child be born alive, that is to say, unless it be alive after it is wholly out of the body of its mother, it cannot be the subject of homicide : even where the child was partly brought forth at the time it received the injury, and although it appeared to have breathed, yet it was not proved to have been alive after it was wholly brought forth, it was holden that the party who inflicted the injury could not be convicted of the homicide. *R. v. Poulton*, 5 Car. & P. 329. *R. v. Brain*, 6 Car. & P. 349, *R. v. Sellis*, 7 Car. & P. 850. And where it appeared, from the evidence of the surgeon, that the child must have died, before it was fully born, so as to have an independent circulation, it was holden not to be the subject of homicide ; *R. v. Wright*, 9 Car. & P. 754 ; but the prisoner, who was the mother of the child, was convicted of concealing its birth. *Id.*, and see *R. v. Enoch*, 5 Car. & P. 539. Where

however, the injury was inflicted on the head of the child, as soon as it made its appearance, and the child was then born alive, but died of the injury it had received, the prisoner, who was indicted for manslaughter, was convicted, and the judges held the conviction to be correct. *R. v. Senior, Ry. & M.* 346. So, killing a child, after it has wholly come forth from the body of the mother, but whilst it is still connected with her by means of the umbilical cord, may be murder; for as soon as the child breathes, it then has a circulation independent of its mother, and if it then be wholly brought forth, it is the subject of homicide. *R. v. Trilloe, Car. & M.* 650. *R. v. Reeves, 9 Car. & P.* 25.

Killing an alien enemy, except in the heat of war, or killing an attainted felon, except by lawful execution, is as much murder as killing any other person. 1 *Hale*, 433, 3 *Inst.* 50. 1 *East, P. C.* 22, s. 14.

To constitute homicide, however, the party must die within a year and a day from the time the injury was inflicted; otherwise the law presumes that the injury was not the cause of the death, and the death cannot be deemed homicide. 1 *Hawk. c.* 317, s. 9.

Having thus stated what is deemed to be homicide, it is now necessary to notice the manner in which the defendant must be proved to have committed it. This is proved, either by some person who actually saw the offence committed,—or by the dying declarations of the deceased,—or by the confession of the prisoner,—or by presumptive or circumstantial evidence, that is to say, by proof of facts and circumstances from which the jury may fairly infer it, and which, as I have already observed *ante*, p. 135, is often as satisfactory as direct and positive evidence. As to the dying declarations of the deceased, *see ante*, p. 140; as to the confession of the defendant, *see ante*, p. 125; and as to presumptive or circumstantial evidence, *see ante*, p. 134. The name of the deceased, must also be proved, if stated; but if there be any variance in this respect, the court have power to amend the indictment. *See ante*, p. 100. And the cause of death must be proved, in order to show that the death arose from the injury which the defendant had inflicted; and the death must be proved to have taken place within a year and a day from the time of the infliction of the injury, for the reason above mentioned. And this latter fact must be proved by express evidence, for it cannot in general be inferred from circumstances. *See ante*, p. 208. In cases where there is direct evidence of the defendant having committed the homicide, that evidence is first given; then any acts or words of the prisoner before or after the offence, which can indicate the motive with which he committed it; and lastly the evidence of a surgeon or other medical man, to describe the wounds, &c., and prove the cause of death. But

where the prisoner's guilt is to be proved by circumstantial evidence only, the first evidence given should be the finding of the body, and the state of it; in many cases, the next evidence should be that of a surgeon or other medical man, who has examined the wounds, &c., to prove the manner in which they were probably inflicted, as well as their being the cause of death; and then the facts and circumstances from which the jury are to imply that the prisoner committed the offence, and his motive for committing it.

2. It must be proved that the homicide was committed by the defendant "feloniously, wilfully, and of his malice aforethought." It must be so laid in the indictment, 14 & 15 Vict. c. 100, s. 4, *ante*, p. 207, and proved. Every homicide is deemed a felony, which is not justifiable or excusable: justifiable, when done of necessity, by an officer of justice in the lawful execution of his duty, or by an ordinary person in prevention of some forcible and atrocious crime; excusable, when done *per infortunium*, or by misadventure, or when done in self-defence. And every act from which death ensues, is said to be done wilfully, that is to say, intentionally, unless done by misadventure. But the malice prepense or aforethought, the preconceived malice, is the great and essential ingredient in murder, which includes in proof the wilfulness as well as the feloniousness of the offence, and without which the homicide is at most but manslaughter, if not excusable or justifiable.

Malice, besides its ordinary signification, namely, a principle or feeling of malevolence towards a particular person, has in the case of murder a more enlarged signification, and is defined to mean "that the fact hath been attended with such circumstances as are the ordinary symptoms of a wicked, depraved, malignant spirit." *Fost.* 256. Malice prepense is therefore either particular or general, and is either express or implied.

Malice, we have seen, (*ante*, p. 121), can only be proved from the admissions or overt acts of the offender. If it be proved, from the acts or words of the prisoner, that previously to the homicide he entertained malice or ill will towards the deceased,—or towards another person, and that he killed the deceased in mistake for such other person,—and if the jury be of opinion that the malice still existed at the time of the homicide, and was wholly or partly the prisoner's motive for committing it: no circumstance of extenuation or excuse, which, in the absence of such proof of express malice, would have reduced the offence to manslaughter, or shown it to be excusable homicide merely, will warrant the jury in finding otherwise than that the prisoner is guilty of murder. *Fost.* 277. *Mason's case*, *Fost.* 132 1 *Hawk. c.* 31, s. 26.

A preconceived malice may be implied from the acts of the

defendant, or from the nature of the act itself which caused the homicide. If a man deliberately do an act, which he knows must or most probably will, be the occasion of another's death, without any apparent or assignable motive for his doing it, and death actually ensue from it, this will be good proof that before he did the act, he intended the death which ensued, and the jury will be warranted in finding him guilty of murder. And this, even although it appear that his intention was not directed against any particular person. If a man, being on a horse which he knows to be used to kick, ride him amongst a crowd of persons, and the horse kick a man and kill him,—the rider is guilty of murder, although he had no malice against any particular person, nor any other intention than that of diverting himself by frightening the persons around him. 1 *Hawk. c. 31, s. 68*. So, where a person fires a loaded pistol among an assembly of persons, or in the public streets where many persons are passing, or the like, and thereby kills a man, he is guilty of murder. *See R. v. Bailey, R. & Ry. 1*.

If a workman throw stones from the top of a house into the street, in a populous town, at a time when it is likely that many persons would be passing, without looking out or giving warning to the persons beneath, and a stone fall upon a man and kill him,—this would be murder. *See Fast. 263*. So, in all other cases, where a man wilfully does an act, which he knows must or probably will cause the death of another, whom he knows not, and a man is thereby killed,—he is guilty of murder, in the same manner as if he had preconceived malice against the individual killed. So, if A. from malice prepense against B., by mistake kill C. or shoot at B. and kill C., or lay poison for B. and it is taken by C., who dies of it,—it is as much murder as if he had killed B., or entertained the malice against C. 1 *Hawk. c. 31, s. 7*. Where a man was indicted for the murder of an aged woman, whom he had undertaken for certain considerations to support, and who had died in his house for want of necessary food and nourishment, Patteson, J., told the jury that if they thought the prisoner had been guilty of neglect so gross and wilful as to satisfy them that he must have contemplated the death of the woman, in that case they should find him guilty of murder; but if they thought that he was only careless, and that although the death was occasioned by his negligence, he did not contemplate it, they should find him guilty of manslaughter. *R. v. Marriott, 8 Car & P. 425. See R. v. Plummer, 1 Car. & K. 600*. So, where a woman was delivered of a child upon the high road, and after carrying it some way, she left the child naked and exposed on the road side, where it died: this was holden by Coltman, J., to be homicide in the mother; but inasmuch as she left it at the side of a road much frequented, and where people were passing at the time, he held it to be manslaughter

only, not murder; and he took this distinction: if a woman leave a child, a young infant, at a gentleman's door, or other place where it is likely to be found and taken care of, and the child die, it will be manslaughter only; but if the child be left in a remote place, where it is not likely to be found, as, for instance, on a barren heath, and death ensue, it will be murder. *R. v. Walters, Car. & M.* 164. And knowingly administering poison to another, and thereby killing him, is deemed so strongly indicative of malice prepense, that it is sufficient to prove that at the time he administered it, he knew it to be poison, and that the quantity was sufficient to kill, without further proof. *See 1 Hale, 455; 1 Hawk. c. 31, s. 20; and see R. v. Packard et al., Car. & M.* 236. These, and all other cases which in our books are ranged under the head of implied malice, will, if properly examined, be found to turn on this single point, "that the fact hath been attended with such circumstances as carry in them the plain indications of a heart regardless of social duty and fatally bent upon mischief." *Fost.* 257. It is the province of the jury to judge of the truth of the facts given in evidence, from which such malice is to be implied; it is the province of the court to judge of the result of the facts, if true, and apply the rule of law to them, and to direct the jury accordingly. *Fost.* 255, 256

In strictness of law, indeed the prosecutor is not bound to prove malice, or to prove facts from which it may be implied, in order to sustain an indictment for murder; for in all cases where the killing is proved, the law presumes that it was done from malice prepense, until the contrary shall be proved on the part of the prisoner. *Fost.* 255; *1 Hawk. c. 31, s. 32; 1 East, P. C. 224, s. 12; 1 Russ.* 483, 506. Which rule of law was seemingly adopted from necessity, like other presumptions; for otherwise murders committed in secret, particularly from implied malice, would be dispunishable. But although this is the strict rule of law, yet, in fairness to the prisoner, those who conduct the prosecution in such cases, usually prove the whole of the facts and circumstances, so far as they have come to their knowledge, as well those which make for the prisoner, as those which make against him.

The instances of implied malice I have here given, are perhaps obvious enough, and create little difficulty; but there are others which are well recognized in law, and guide the decisions of judges, which cannot rightly be treated of, without discussing the whole subject of homicide, as well the cases in which it is justifiable or excusable, as those in which it amounts to murder or manslaughter; for homicide by accident, may under circumstances sometimes amount to manslaughter, and even murder; and the same as to homicide in furtherance of justice, or in self-defence; and homicide in a sudden combat may in some cases amount to murder. In order, therefore,

to render this portion of the work complete, I propose to treat of the whole subject of homicide; and shall take the discourse on homicide of Mr. Justice Foster for my ground work.

Homicide is either justifiable, excusable, or felonious; and in this order it is usually treated. I mean, however, to treat of it here under the following heads:

1. *Homicide by Accident.*
2. *Homicide in Furtherance of Justice.*
3. *Homicide in Self-defence, or in Defence of Self, Family, or Property.*
4. *Manslaughter.*
5. *Murder.*
6. *Principals and Accessories.*

1. *Homicide by Accident.*

Homicide by accident or *per infortunium*, (sometimes, though improperly called chance medley), is, where a man, doing a lawful act, without intention of bodily harm to any one, and using proper caution to prevent danger, unfortunately happens to kill another. *Fost.* 258; 1 *Hawk. c.* 29, *s.* 1, it is excusable, and not liable to any punishment. 9 *G.* 4, *c.* 31, *s.* 10.

The act must be lawful.] The act must be lawful, which the party is doing at the time of the accident. As where a labourer was at work with a hatchet, and the head flew off, and killed a person standing by, this was excusable as being homicide *per infortunium*. 1 *Hawk. c.* 29, *s.* 2. But if the act be unlawful, that is to say, *malum in se*, the homicide will be murder or manslaughter, according to circumstances: if it be a felony, the homicide is murder; if a misdemeanor or trespass, manslaughter. *Fost.* 258. If a man shoot at poultry, and by accident kill a man,—if he intended to steal the poultry, the homicide is murder; if done wantonly, without intent to steal, manslaughter. *Fost.* 258, 259; 1 *Hawk, c.* 29, *s.* 11; *Id. c.* 31, *s.* 44; 1 *East, P.C.* 255, *s.* 31. Where a man whipped a horse on which another was riding, whereupon the horse sprung out, and ran over a child and killed him, this was manslaughter in the man who whipped, misadventure in the rider. 1 *Hawk. c.* 29, *s.* 3. So, if a man throw a stone at another's horse, and by accident hit another man and kill him, it is manslaughter. 1 *Hale*, 475. But if the act done be *malum prohibitum* merely,—as if an unqualified person shoot at game, and by accident kill a person, it will have no effect upon the nature of the offence, but the homicide will be of the same degree as if the party were qualified. *Fost.*

259; 1 *Hale*, 475. So, homicide happening by accident in the course of sports and recreations which are innocent and allowable, (among which Mr. Justice Foster reckons fencing and cudgel playing, although Lord Hale seemed to think differently, 1 *Hale*, 472), it falls within the rule as to homicide by misadventure, and is excusable; *Fost.* 259—261; 1 *Hawk.* c. 29, ss. 5—7; but cock-throwing at Shrovetide, being a cruel unmanly custom, is not so, and Mr. Justice Foster once ruled it to be manslaughter, where a man, missing the cock, hit a child and killed it. *Fost.* 261.

Without intent to do bodily harm.] The act must not only be lawful, but it must be done without intention to do bodily harm. *Fost.* 258. If an act, unlawful in itself, be done deliberately, and with intention of mischief or great bodily harm to a particular person,—or of mischief indiscriminately, fall where it would,—and death ensue, against or beside the intention of the party, it is murder. *Fost.* 261; 1 *Hawk.* c. 29, s. 10. If a man throw a stone at another, with a deliberate intention to hurt him, but not to kill him, and by accident it kill him, the party is guilty of murder. 1 *Hale*, 440, 441. If a man, from preconceived malice against another, but not intending to kill him, but merely to beat him, unfortunately happen to kill him, it will be no excuse that he did not intend his death, but the homicide is murder. *Fost.* 259. If, however, he throw a stone at another, wantonly and in play merely, and happen to kill, it is only manslaughter. 1 *Hawk.* c. 29, s. 9. If several persons resolve to resist all opposers in their commission of a breach of the peace, and intending to effect their object in a manner tending to tumult and affrays,—as to commit a violent disselsin, or to hunt in a park, or the like,—and in so doing happen to kill a man, they are all guilty of murder. 1 *Hawk.* c. 31, s. 51. So, where several persons, armed with bludgeons, came to assist a tenant in removing his goods to avoid a distress, and the landlord and others endeavoured to prevent it, and in the course of the scuffle which ensued, a child standing near, who was not concerned in the matter, was killed by one of the men, but by whom was not known: Holt, C. J., and Pollexfen, J., were of opinion that this was murder in all; but the rest of the judges held it to be murder only in him who committed it. *R. v. Hubson et al.*, 1 *East*, P. C. 258. Also, as has been already mentioned, (*ante*, p. 214), if A. from malice prepense intending to kill B. by mistake or mischance kill C., or lay poison for B. and it is taken by C. who dies of it, this is as much murder as if he had killed B., or entertained the malice against C. 1 *Hawk.* c. 31, s. 7, 45; *Fost.* 261. Or if the homicide were committed under such circumstances, that if he had killed B. it would only have been manslaughter, the killing of C.

will be manslaughter only. *Fost.* 262; *R. v. Snow*, 1 *Leach*, 151.

Done in a proper manner and with due caution.] The act must not only be lawful or innocent, but it must be done in a proper manner, and with due caution to prevent mischief. *Fost.* 262.

Parents, masters, and other persons having authority in *fore domestico*, may give reasonable correction to those under their care; and if death ensue without their fault, it will be no more than accidental death. *Fost.* 262. But if the correction exceed the bounds of due moderation, either in the measure of it, or in the instrument made use of for the purpose, it will be either murder or manslaughter, according to the circumstances of the case: if with a cudgel or other thing not likely to kill, though improper for the purpose of correction, manslaughter; if with a dangerous weapon likely to kill or maim, due regard being always had to the age and strength of the party, murder. *Fost.* 262. A blacksmith struck his apprentice with a bar of iron, by way of correction for improper behaviour, and killed him: this was holden to be murder. *Grey's case*, *Kel.* 64, 65. A woman kicked and stamped on the belly of her child, and killed it: this was holden to be murder. 1 *East*, *P. C.* 261, s. 37. But where a woman, being angry with one of her children, took up a small piece of iron which she used as a poker, and threatened him with it, upon which he ran away, and she threw the poker at him; the poker missed the boy, but hit another person who was then entering the door, on the head, and killed him; this was holden to be manslaughter, as it would have amounted to that offence only if she had killed the son. *R. v. Conner*, 7 *Car. & P.* 438. Where a father corrected his son with a rope, for stealing, the son having before been repeatedly guilty of the like offence, and he beat him so much that he died: this was holden to be manslaughter. *Anon.* 1 *East*, *P. C.* 261, s. 37. Where a shepherd boy having allowed some sheep to escape from their pen, his master, who saw it, ran towards the boy, took up a hedge stake that was lying near him and threw it at him; it hit the boy on the head, fractured his skull, and he died: the master being indicted for murder, the jury found him guilty of manslaughter. *R. v. Wiggs*, 1 *Leach*, 378 n. Where a woman employed her niece, who was in a very delicate state of health and in a consumption, in stay stitching, fourteen or fifteen hours a day, and beat her cruelly with a cane or rod whenever she did not do the required quantity of work: the girl died of consumption, but it was proved that her death was hastened by the ill-treatment she had received from her aunt; and the aunt being indicted for it, it was holden to be manslaughter. *R. v. Chessman*, 7 *Car. & P.* 455.

But where a person takes upon himself to correct another, where by law he has no right, and death ensues, it will be manslaughter at the least, without reference to the measure of the punishment, or the instrument with which it was inflicted. And therefore, where a pickpocket was thrown into a pond, for the purpose of ducking him, merely by way of punishment, and he was drowned: this was holden to be manslaughter. *R. v. Fray*, 1 *East*, P. C. 236.

As to the caution necessary to be observed, it should be carefully observed by all persons following their usual and lawful occupations, particularly occupations from which danger may arise. If a workman throw stones, rubbish, or other things from a house, in the ordinary course of his business, and a person underneath happen to be killed:—then, if he looked out and gave timely warning beforehand to those below, it will be accidental death; if without such caution, it will be manslaughter at the least; if it be in London or other populous place, then if done early in the morning, and due warning given, it will be excusable; but if done when the street is full of people, the death will then be manslaughter, notwithstanding the warning given, *Fost.* 262, 263, or murder, if there have been no look-out or warning. 1 *East*, P. C. 262.

If a person driving a cart or other carriage, happen to kill: if he saw or had timely notice of the mischief likely to ensue, and yet drove on, it will be murder, for it was wilfully and deliberately done; if he might have seen the danger, but did not look before him, manslaughter; but if the accident happened in such a manner, that no want of due care could be imputed to the driver, it will be accidental death, and the driver will be excused. *Fost.* 263. If a person by careless or furious driving, unintentionally run over another, and kill him, it will be manslaughter; *R. v. Walker*, 1 *Car. & P.* 320; *R. v. Mastin*, 6 *Car. & P.* 396; *R. v. Grout*, *Id.* 629; *R. v. Timmins*, 7 *Id.* 499; *R. v. Swindall et al.*, 2 *Car. & K.* 230; or if the person in command of a steam boat, by carelessness or negligence unintentionally run down a boat, &c., and a person therein is drowned, he is guilty of manslaughter. *R. v. Green*, 7 *Car. & P.* 158; see *R. v. Allen*, *Id.* 153; *R. v. Taylor*, 9 *Car. & P.* 670. So, where two persons were riding on horseback, furiously, along a road, and one passed the deceased, (who was also on horseback) without doing him any injury, but the other came in collision with him, both fell, and the deceased was thereby killed: Patteson, J., directed an acquittal as to the first of the two, for he could not be deemed answerable for the act of the other; and as to the second, as the evidence rendered it doubtful whether he ran his horse against the deceased, or the deceased's horse being unruly got into his way, he directed the jury that if they were of opinion that by furious riding he ran against the deceased, they should

find him guilty of manslaughter, but if they thought the deceased's horse was unruly and got into the way, they should acquit him. *R. v. Mastin*, 6 *Car. & P.* 396.

So, if a man take upon himself an office or duty, requiring skill or care,—if by his ignorance, carelessness or negligence he cause the death of another, he will be guilty of manslaughter. Where it was the duty of the ground bailiff of a mine, to regulate the ventilation, and to direct where air headings should be placed, and in consequence of his neglecting to do so, there was an explosion of fire damp in the mine, and nineteen of the workmen were killed: Maule, J., held this to be manslaughter. *R. v. Haines*, 2 *Car. & K.* 368, and see *R. v. Barratt*, *Id.* 343. Where an ironfounder, employed to cast a cannon, did it so imperfectly, that upon its being fired it burst and killed a man, it was holden that he was guilty of manslaughter. *R. v. Carr*, 8 *Car. & P.* 163. There have also been several cases of indictments against medical men, &c., arising from the death of patients; and this general rule seems to be established by them: that if any person, whether medical man or not, professing to deal with the life or health of another, cause death, either by his gross ignorance or want of skill, or by his gross negligence, or by his gross rashness and want of proper caution, he is guilty of manslaughter. See *R. v. St. John Long*, 4 *Car. & P.* 423. 398. *R. v. Van Butchell*, 3 *Car. & P.* 629. *R. v. Williamson*, *Id.* 635. *R. v. Ellis*, 2 *Car. & K.* 470. Where the defendant was indicted for manslaughter, by putting plasters made of corrosive and dangerous ingredients on the head of a child, Bolland, B., stated the law, as then settled by the judges, to be, that if any person, whether a regular or licensed medical man or not, profess to deal with the life or health of any other person, he is bound to use competent skill and sufficient attention; and if the patient die through default of either, the party is guilty of manslaughter. *R. v. Spiller*, 5 *Car. & P.* 333. Where the defendant, a publican, and agent for the sale of certain pills, was indicted for manslaughter, by administering to the deceased a quantity of those pills, several medical witnesses gave it as their opinion, that medicine of so violent a character as that of which the pills were composed, could not be administered to a person in the state in which the deceased then was, without accelerating his death: Lord Lyndhurst, in summing up the case to the jury, said that there was no difference in cases of this kind between a licensed physician or surgeon, and a person acting as such without licence; and that if either, having a competent degree of skill and knowledge, make an accidental mistake in his treatment of a patient, through which mistake death ensues, he is not thereby guilty of manslaughter; but if, where proper medical assistance can be had, a person totally ignorant of the science of medicine,

take upon himself to administer a violent and dangerous remedy to one labouring under disease, and death ensue in consequence of that dangerous remedy having been so administered, he is guilty of manslaughter. *R. v. Webb*, 1 *Mo. & R.* 405. Also, if a medical man or other person administer any medicine to a woman, or perform any operation or do any other thing, for the purpose of procuring abortion, and thereby kill the woman, he is guilty of murder. *Tickler's case*, 1 *East*, *P. C.* p. 230. And where a woman was indicted for the murder of an infant, by using means to procure abortion in its mother, then in the sixth month of her pregnancy, by which means it was untimely brought forth, lived a few hours and then died; and after proof of the facts, a medical man proved that it was impossible for a child, born at that period of gestation, to live any considerable length of time: Maule, J., in summing up, told the jury that if a person, intending to procure abortion, do an act, which causes a child to be born so much earlier than the natural time, that it is born in a state much less capable of living, and afterwards dies in consequence of its exposure to the external world, the person who by such misconduct, so brings the child into the world, and puts it thereby in a situation in which it cannot live, is guilty of murder. *R. v. West*, 2 *Car. & K.* 784. *See ante*, p. 211.

Before a man deal with a gun or pistol, as if it were not charged, it is incumbent upon him to ascertain whether it is so or not; and if he do not use a reasonable caution in this respect, and afterwards upon pulling the trigger it unexpectedly explode and kill a person, it will be manslaughter. In one case, where a man found a pistol in the street, and trying it with the ramrod it appeared not to be charged; he brought it home and showed it to his wife, and whilst she was standing near him, he pulled up the cock, pulled the trigger, the pistol exploded, and killed her: this was holden to be manslaughter. *Kel.* 41. But the reporter seems to disapprove of the decision; and Mr. Justice Foster declares that it is not law; he says the law does not require the utmost caution that can be used, but it is sufficient that a reasonable precaution, such as is usual in the like cases, shall be taken; and he states a case, in which he himself ruled that a homicide, under similar circumstances, was by misadventure merely, and the defendant was acquitted. *Fost.* 263—265.

2. *Homicide in furtherance of Justice.*

In executing criminals.] The sheriff and those acting under him are justified in law, in carrying a sentence of death into execution, provided the sheriff has a warrant authorizing him to do so. And the same as to those to whom the court of

Queen's Bench directs its warrant for the like purpose. *See ante*, p. 202. But he must strictly pursue the warrant; he cannot substitute one kind of death for another; if he do, or if he act without warrant, he will be guilty of murder. *Fest.* 267. 1 *Hawk.* c. 28, ss. 4—10. *Id.* c. 31. ss. 66, 67. The Queen, however, by her warrant, may remit any part of the sentence, or substitute beheading for hanging; and those to whom such warrant is directed, are perfectly justified in obeying it. *Fest.* 268—270.

Upon an arrest, &c.] Where persons, having authority to arrest or imprison, and using proper means for that purpose, are resisted in so doing, and the party making resistance is killed in the struggle, the homicide is justifiable; *Fest.* 270. 1 *Hawk.* c. 28, s. 11. *Id.* c. 29, s. 16. 1 *Hale*, 457; and the officer, &c., in such a case need not retreat, as in the ordinary cases of *se defendendo*. 2 *Hals*, 218. And the same in civil actions. 1 *Hawk.* c. 28, ss. 17, 18. *Fest.* 270. But if the killing were after the resistance ceased, or if the other party were not authorized to arrest, it would be manslaughter at least, 1 *East*, P. C. 297, if not murder. On the other hand, if during the struggle, the party arrested or about to be arrested, kill the party arresting, it will be murder; for the law in that case implies malice. *Fest.* 270. 1 *East*, P. C. 295. 298. In what cases an offender may legally be arrested by a private person without warrant, when in the act of committing the offence, *see ante*, pp. 21—23,—in case of riots, *Id.* 23,—after the offence committed, *Id.* 25,—or in prevention of offences, *Id.* 27;—in what cases by a constable, *Id.* 27,—by a magistrate, *Id.* 27,—or on hue and cry, *Id.* 28;—when and where, *Id.* 28,—and how, *Id.* 28. In what cases he may be arrested under a warrant, *see ante*, p. 30,—when, where, and how, *Id.* 33. In a civil action however, a private person has no right to arrest, unless the warrant be specially directed to him.

If in the case of a felony or a dangerous wound given, the offender fly, and the constable or private person pursue,—if in the pursuit the party flying be killed, where he cannot be otherwise overtaken, it is justifiable homicide. *Fest.* 271. 1 *Hawk.* c. 28, s. 11. But this is not the case, where the arrest is in a civil proceeding, *Fest.* 271. 1 *Hawk.* c. 28, s. 20, or for a mere trespass or misdemeanor; *Fest.* 271; 1 *Hale*, 481. 2 *Hale*, 217; there, if the killing were with a deadly weapon, it would be murder, or if with a cudgel or weapon not likely to kill, manslaughter. *Fest.* 271. *See R. v. Longden*, R. & Ry. 228. 1 *Hale*, 53, 481. 495, 496. 2 *Hale*, 217. Where a constable, employed to guard a copse, from which wood had been stolen, saw a man coming out of the copse with wood which he had stolen, and called to him to stop, but the man ran away; the constable, having a gun,

then fired at him, and shot him in the leg : stealing the wood was but a misdemeanor, punishable on summary conviction, unless the party had been twice previously convicted for the like offence, and then it would have been felony ; In fact, this man had been twice previously convicted, but the constable did not know it : the constable being indicted for shooting at and wounding the man, and convicted, but the question reserved for the criminal appeal court, the judges held that as the constable at the time did not know that the prisoner had committed a felony, he was not justified in firing at him, and that therefore the conviction was right. *R. v. Daddon*, 20 *Law J.* 57 *m.*

Also, in the case of a sudden affray, where no felony is committed or dangerous wound given, if a person interposing to part the combatants, and giving notice to them of his friendly intention, be assaulted by either of them, and in the struggle should happen to kill, this will be justifiable ; but if he be killed, it will be murder. *Fost.* 272 ; 1 *Hawk.* c. 31, s. 48 ; 1 *Hale*, 484. So, if persons engaged in a riot, or a forcible entry or detainer, stand on their defence, and continue the force in opposition to the commands of a justice of the peace, &c., or resist such justice in his endeavours to arrest them, the killing of them may be justified. 1 *Hawk.* c. 28, s. 14 ; *see ante*, p. 25. And the killing of rioters, even by private persons, who cannot otherwise suppress them, or defend themselves from them, will be justifiable. *Id.*

And lastly, if a criminal, endeavouring to break prison, assault his gaoler, and be killed in the affray, it is justifiable homicide. 1 *Hawk.* c. 28, s. 13. *Fost.* 321.

As to the killing of officers and private persons in making arrests, &c., I shall have a further occasion to observe upon it, when I come to treat of murder.

3. *Homicide in Defence of Self, Family, or Property.*

Se defendendo.] If a person, engaged in a sudden affray, quit the combat before he have inflicted a mortal wound, and retreat or fly as far as he can with safety, and then, urged by mere necessity, kill his adversary for the preservation of his own life,—the homicide is excusable. *Fost.* 276. 1 *Hale*, 481, 483. 1 *Hawk.* c. 29, ss. 13, 14. It formerly subjected the party to forfeiture ; *Fost.* 275, 276 ; but now by stat. 9 G. 4, c. 31, s. 10, no punishment or forfeiture shall be incurred by any person, who shall kill another in his own defence. It differs from manslaughter in this, that in manslaughter, the combat is supposed to continue until after the mortal wound is given ; *Fost.* 276, 277 ; but in homicide *se defendendo*, the party must have declined the combat, and have retreated,

before that, and the mortal wound must be given afterwards, when he had no other means of saving his own life. *Fost.* 277. It matters not who began the affray, or gave the first blow, or whether the party had given wounds, not mortal, before he retreated; *Fost.* 277. 1 *Hawck. c.* 29, ss. 15, 17; but if he decline the combat before a mortal wound is given, and retreat as far as he can with safety to his own life, he will be justified in giving a mortal wound afterwards in his own defence. If however the first assault were from malice, which is to be collected from circumstances, and the retreat merely colourable, and the party afterwards turn on his adversary and kill him, it is murder. *Fost.* 277. 1 *Hawck. c.* 29, s. 18. *Id. c.* 31, s. 26. *Id. c.* 28, s. 2. Where, upon an indictment for stabbing with intent to murder, it appeared that the prosecutor and prisoner having quarrelled, they fought, the prosecutor striking the first blow; the prisoner ran back a short distance, and the prosecutor pursued and overtook him, upon which the prisoner, who had taken out his knife on his retreat, gave the prosecutor a cut across the abdomen: Park, J., told the jury, that if they were of opinion that the prisoner retreated for the purpose of getting his knife out, in order that he might have an undue advantage in the conflict, they should find him guilty; but if they thought that he retreated with an intention to escape from an adversary of superior strength, but finding himself pursued, drew his knife to defend himself, they should acquit him; the prisoner was acquitted. *R. v. Kessal*, 1 *Car. & P.* 437. But although the retreat be *bonâ fide*, yet the retreating party will not be justified in giving a mortal wound, unless he had reasonable ground to apprehend that he would otherwise be killed himself; if he do, the killing will amount to manslaughter. *Fost.* 278. Where it appeared, on a trial for murder, that the prisoner coming home drunk, his father desired him to go to bed, and on his refusing to do so, a scuffle took place between him and his father; his brother, who was in bed, hearing the noise, got up and fell upon the prisoner, threw him down, beat him upon the ground, and kept him down so that he could not avoid the blows; and as they were striving together, the brother who was undermost stabbed the other with a penknife, of which wound he died; it was at first doubted whether this was murder, or homicide *se defendendo*; but it being referred to the judges, they held it to be manslaughter, "for there did not appear to be any such inevitable necessity, as to excuse the killing in this manner." *R. v. Nailor*, *Fost.* 278.

There is also a species of excusable homicide in self-preservation, mentioned by Lord Bacon, and by Mr. Justice Blackstone, in his Commentaries, which, although not rightly classed under this head, it may be convenient to notice in this place:—namely, where the party slaying and the party slain

are equally innocent. One instance, amongst others mentioned, is, where two men, being shipwrecked, get upon the same plank, but finding it not able to save them both, one of them thrusts the other from it, whereby he is drowned: this is excusable from unavoidable necessity, and the principle of self-defence. 4 *Bl. Com.* 186. 1 *Hawk. c.* 28, s. 26.

Se et sua defendendo.] If a person, by violence or surprise, attempt to commit a felony upon the person, habitation, or property of another, the latter may repel force by force, and if in the conflict he happen to kill the offender, the homicide is justifiable. *Fost.* 273. This it will be perceived, is perfectly different from the homicide *se defendendo* which we have been considering; in that case the homicide is excusable merely, in this justifiable; there the party was formerly subject to a forfeiture, here he was not; 24 *H. 8, c.* 5; in that case the party must retreat as far as he can with safety; in this he is not bound to retreat at all, but on the contrary he may pursue the offender until he find himself or his habitation, or property, out of danger. *Fost.* 273. Thus, if a man attempt to rob or murder another, the latter may repel force by force; and even his servant, attending upon him, or any other person present, may interpose to prevent the intended offence; and if the party attacking be killed by either the party attacked or by him who interposes, the homicide is justifiable. *Fost.* 274. 1 *Hale*, 481, 484. 1 *Hawk. c.* 28, ss. 21, 24. *Id. c.* 29, s. 16. And this rule extends to the case of master and servant, husband and wife, parent and child, killing in defence of each other respectively. 1 *Hale*, 484. So, a woman may lawfully kill, in defence of her chastity, if a man attempt to commit a rape upon her. *Fost.* 274. 1 *Hale*, 485. So, if an attempt be made to commit arson or burglary in the habitation, the owner or any part of his family, or even a lodger, may lawfully kill the assaillants, to prevent the mischief intended. *Fost.* 274. But a man cannot thus justify homicide, to prevent a mere trespass, 1 *Hawk. c.* 28, s. 23. *Cook's case*, *Cro. Car.* 537. 1 *Hale*, 445, 485. *Fost.* 291, or any offence without force. 1 *Hale*, 488. Where, upon an indictment for manslaughter, it appeared that the prisoner, being employed by the owner of a garden to watch it at night, seeing a man on the garden wall, hailed him, upon which the man said to another (whom the prisoner did not see), "Tom, why don't you fire?" The prisoner again hailed him, upon which he said, "Shoot and be d—d;" the prisoner then fired at his legs, but unfortunately shot, not the man on the wall, but another that was standing on the ground, and whom he had not seen; and upon the deceased were found three dead fowls, a housebreaker's crowbar, a flint, steel, matches, &c.: Garrow, B., told the jury, that, as the prisoner's life was threatened, he was justified in firing; but if

that had not been the case, he would have been guilty of manslaughter, for he would not have been justified in shooting at persons coming on his master's premises, even in the night. *R. v. Scully*, 1 *Car. & P.* 319. In cases where a man can thus justify homicide,—if instead of killing, he himself be killed, it is murder.

4. *Manslaughter.*

Manslaughter is the unlawful killing of another, without malice, express or implied. It may be either voluntary, upon a sudden heat or passion, or involuntary, in the commission of some unlawful act.

In what cases homicide by accident may amount to the offence of manslaughter, I have considered, *ante*, p. 216; in what cases homicide in furtherance of justice may amount to it, *ante*, p. 221; in what cases homicide *se defendendo* may amount to it, *ante*, p. 223; in what cases homicide *se et sui defendendo* may amount to it, *ante*, p. 225. I shall here consider the cases of homicide upon provocation, and homicide in the case of sudden combat.

On provocation.] No provocation will justify a man in killing another; nor will it excuse him. Killing on provocation, therefore, must be manslaughter or murder. Words of reproach, however grievous,—or indecent provoking actions or gestures expressive of contempt or reproach, without assault upon the person, however irritating,—are not provocation sufficient to free the party killing from the guilt of murder: certainly not, where he makes use of a deadly weapon, or otherwise manifests an intention to kill or to do some bodily harm; but if he merely give the other a box on the ear, or strike him with a stick or other weapon not likely to kill, and unluckily and against his intention kill him, it will be but manslaughter. *Fost.* 290; 1 *Hawk.* c. 81, ss. 33, 34. So in all other cases of killing upon slight provocation, if it can reasonably be collected from the nature of the weapon used, or from any other circumstance, that the party intended to kill or to do some great bodily harm, such homicide will be murder; *Fost.* 291; but it will be only manslaughter where he meant, not to kill, but to chastise merely, and in a moderate and reasonable degree. Where a man found another trespassing upon his land, beat him, and unluckily happened to kill him, this was holden to be manslaughter; 1 *Hale*, 473; but this must be understood of a beating, not with a mischievous intention, but merely to chastise him for the trespass, and to deter him from committing the like again; for if he had killed him with a bill or hedge stake, or had given him an outrageous beating with an ordinary cudgel, beyond the

bounds of sudden resentment, it would have been murder. *Fost.* 291; 1 *Hawk. c.* 31, *ss.* 34. 42. Where a park-keeper found a boy stealing wood in his master's ground, and bound him to his horse's tail and beat him; the horse took fright, ran away, dragged the boy upon the ground, and injured him so that he died: this was holden to be murder, for it was a deliberate act and savoured of cruelty. *Fost.* 292. *Halloway's case*, *Cro. Car.* 131. *Palm* 545. *W. Jon.* 198. Where there was an affray in the street, and one Stedman, a soldier, ran hastily towards the combatants; a woman seeing him run, called out to him, "You will not murder the man, will you?" and Stedman replied, "What is that to you, you bitch," the woman gave him a box on the ear, and he gave her a blow on the breast with the pommel of his sword; the woman then fled, and he, pursuing, stabbed her in the back and killed her: Stedman being indicted for murder, Holt, C. J., thought at first that it amounted to that offence, a single box on the ear from a woman not being a sufficient provocation to kill in this manner, after he had given her a blow in return for the box on the ear; but it afterwards appearing, in the progress of the trial, that the woman struck the soldier in the face with an iron patten, and drew a great deal of blood, it was holden clearly to be no more than manslaughter. *Stedman's case*, *Fost.* 292. Another case, as reported by Strange, (*R. v. Tranter et al.*, 1 *Str.* 499), was thus: Mr. Lutterell, being arrested for a small debt, prevailed on one of the officers to go with him to his lodgings, whilst the other was sent for the attorney's bill; words arose at the lodgings about civility money, which Lutterell refused to pay, and he went up stairs, as if to fetch money to pay the debt and costs, but he soon returned with a brace of loaded pistols in his bosom, which, on the importunity of his servant, he laid on the table, saying that he did not intend to hurt the officers, but he would not be ill-used; the officer who had been sent for the attorney's bill soon returned to his companion, and words of anger then arising, Lutterell struck one of them on the face with his walking cane, and drew a little blood; whereupon both of them fell upon him, one stabbed him in nine places, he all the while on the ground begging for mercy and unable to resist them, and one of them fired one of the pistols at him whilst on the ground and gave him his death's wound: the Chief J. said it could be no more than manslaughter, and the jury found accordingly. If this were a correct report, no doubt it would be an extraordinary case: but comparing it with the printed report of the trial, there appears to be many material circumstances omitted in it; when Mr. Lutterell brought his pistols down, he declared that he would not be forced from his lodgings; he threatened the officers several times; one of the pistols was fired by one of the officers, but after the affray was over both pistols appeared to have been recently discharged, and

one of the officers was wounded by a pistol shot in the finger ; when the affray began, Lutterell had a sword by his side, and after it was over, the sword was found drawn from the scabbard and broken ; and as to his calling for mercy, the evidence was, that when on the ground he held up his hands *as if* begging for mercy : *Fost.* 292, 293 : these omitted particulars may account for the opinion of the Chief Justice, and the verdict of the jury. Another case, (*Rowly's case*, 12 *Co.* 87), is thus reported :—a boy having fought with another, and being beaten, ran home to his father, all bloody ; the father immediately took a staff, ran three quarters of a mile after the other boy, beat him, and he died of the beating ; this was ruled to be manslaughter, because done in sudden heat and passion. But in other cotemporary reports, the case is somewhat different : according to one (*Cre. Jac.* 296) Rowly struck with a “small cudgel,” and according to another (*Godb.* 183) with a “rod,” and it may fairly be collected from both, that the accident happened by a single stroke with a cudgel [or rod] not likely to kill. *Fost.* 295. So, where a person, having his pocket picked, seized the offender, and being encouraged by the people present, threw him into an adjoining pond for the purpose of ducking him, but without any apparent intention of taking his life, and he was drowned : it was holden to be manslaughter only. *R. v. Fray*, 1 *East*, *P. C.* 296.

But if the provocation be great, and such as to excite strong indignation and passion,—if the party provoked at the instant kill the other, he is guilty only of manslaughter. As if a man find another in the act of adultery with his wife, and in the first transport of passion kill him, he is guilty of manslaughter only. *Fost.* 296 ; 1 *Hale*, 486 ; 1 *Hawk. c.* 31, *s.* 36. If an assault be made with violence or circumstances of indignity upon a man's person, as by pulling him by the nose,—if it be resented immediately by the death of the aggressor, and it appear that the party acted in the heat of blood upon that provocation, it will be manslaughter only. *Kel.* 135 ; 4 *Bl.* 191 ; 1 *East*, *P. C.* 233. Where three Scotch soldiers were drinking together in a public house, and one of them struck some strangers, who were drinking together in another box, with a small rattan, for having used several opprobrious epithets, and reviled the character of the Scotch nation, and an altercation ensued ; and one of the strangers laid hold of the soldier who had stricken, and threw him against a settle ; when the soldier had paid his reckoning, the stranger again shoved him from the room into the passage, upon which the soldier exclaimed that “he did not mind killing an Englishman more than eating a mess of crowdy ;” upon which the stranger, assisted by another person, violently pushed the soldier out of the house ; whereupon the soldier instantly turned round, drew his sword, and stabbed the stranger to the heart : this was

holden to be manslaughter. *R. v. Taylor*, 5 *Burr.* 2703. So, where a quarrel arose between some soldiers and a number of keelmen, at Sandgate, and a violent affray ensued, in which one of the soldiers was very much beaten; the prisoner, another of the soldiers, who had driven part of the mob down the street with his sword in the scabbard, seeing on his return his comrade thus used, drew his sword, and bid the mob to stand clear, as he would sweep the street, and on their pressing on him, he struck at them with the flat side of his sword, and as they fled he pursued; the other soldier in the mean time got away, and when the prisoner returned, he asked if they had murdered his comrade; and being several times again assaulted by the mob, he brandished his sword and bid them keep off; just at that time the deceased, who from his dress might be mistaken for a keelman, was passing, the prisoner went up to him, hit him on the head with his sword, and he presently died: this was holden to be manslaughter, on account of the previous provocation, and the blood being heated by the contest. *R. v. Brown*, 1 *East*, *P. C.* 245; 1 *Leach*, 151.

But if the provocation were sought for by the party killing, it will be no extenuation of the offence; as if A. say to B., "I will not strike you, but I will give you a pot of ale to touch me," and thereupon B. strikes, and A. kills him: this is murder. 1 *Hale*, 457; 1 *Hawk. c.* 31, *s.* 24.

In case of sudden combat.] But whether the provocation be by words or acts, and whether slight or great, or indeed upon any sudden provocation, if the parties come to blows, no undue advantage being taken on either side, and death ensue, it is only manslaughter. *Fost.* 295. If A. use provoking language or behaviour to B., and B. strike him, whereupon a combat ensues, and A. is killed: this is manslaughter, for it was a sudden affray, and they fought upon equal terms; and in such combats upon sudden quarrels, it matters not who gave the first blow. *Fost.* 295. 1 *Hale*, 458. But if B. had drawn his sword, and made a pass at A., (A.'s sword being undrawn), and thereupon A. had drawn his sword, and a combat ensued, in which A. was killed,—this would be murder; for B. by making a pass at A., whilst the latter's sword was undrawn, showed that he sought his blood; and A.'s endeavour to defend himself, which he had a right to do, will not excuse B. *Fost.* 295. *Kel.* 61. 1 *Hawk. c.* 31, *s.* 27. If B. however had first drawn, and forborne until his adversary had drawn also, it would have been no more than manslaughter. *Fost.* 295. *Kel.* 130. 1 *Hawk. c.* 31, *s.* 28. Where one Mawgridge, upon words of anger passing between him and Mr. Cope, threw a bottle with great force at the head of Cope, and immediately drew his sword; Cope then threw a bottle at

the head of Mawgridge, and wounded him, whereupon Mawgridge stabbed him and he died : this was holden to be murder ; for Mawgridge, by throwing the bottle, evinced an intention of doing some great mischief to Cope, and drawing his sword immediately after, showed that he intended to follow up this blow. *Mawgridge's case*, *Kel.* 128. *East.* 295, 296. Where, upon an indictment for cutting with intent to murder, it appeared that a quarrel arose between the prosecutor and prisoner, both being intoxicated ; the prosecutor struck the first blow, and they fought for a few minutes, when the prisoner ran back a short distance, and the prosecutor pursued and overtook him, on which the prisoner, having taken out his knife in his retreat, gave the prosecutor a cut across the abdomen : Park, J., left it to the jury to say, whether the prisoner ran back with a malicious intention of getting out his knife, to inflict an injury on the prosecutor, and so gain an advantage in the conflict, for if so, and death had ensued, it would have been murder ; or whether the prisoner *bonâ fide* ran away from the prosecutor, with intent to escape from an adversary of superior strength, but finding himself pursued, he drew his knife to defend himself, in which case, if death had ensued, it would be manslaughter only. *R. v. Kessal*, 1 *Car. & P.* 437. Where, upon an indictment for a similar offence, the prosecutor stated, that his brother and the prisoner were fighting, and he laid hold of the prisoner to prevent him from striking his brother, and held him down, but did not strike him, and that the prisoner then stabbed him with a knife above the knee : Parke, J., told the jury, that if they were of opinion that the prosecutor did no more than was necessary to restrain the prisoner from beating his brother, they should find the prisoner guilty, because in such a case the crime, if death had ensued, would have been murder ; but if they thought that the prosecutor had done more than was necessary, or if he struck any blow, then the prisoner should be acquitted. *R. v. Bourne*, 5 *Car. & P.* 120. Where the prisoner and one Levy quarrelled and went out to fight ; after two rounds, which occupied about two minutes, Levy was found to be stabbed in a great many places, and of one of those stabs he almost instantly died ; and it appeared that no person but the prisoner could have stabbed him, and that he had a clasped knife in his possession before the affray began : Bayley, J., told the jury, that if the prisoner used the knife privately from the beginning,—or if before they began to fight, he placed the knife so that he might use it during the affray, and used it accordingly, it was murder ; but if he took to the knife after the fight began, and without having placed it to be ready during the affray, it was only manslaughter ; the jury found him guilty of murder. *R. v. Anderson*, *Russ.* 531. So where the prisoner, a shoemaker, whilst drunk, quarrelled with the

deceased, they stood up to fight, but were separated; the prisoner went home, and after being in his house a few minutes, came out with a shoemaker's knife, sat down upon a bench before his garden gate, and began cutting the heel of a shoe with the knife; the deceased, on returning from his work, passed the prisoner, called out to him, "Are you not an aggravating rascal?" to which the prisoner replied, "What will you be, when you have got from your master's feet?" upon which the deceased seized the prisoner by the collar, and dragging him off the bench, they both rolled down into the cart way, the prisoner undermost, and struggled for some time; the deceased perceiving the knife in the prisoner's hand, endeavoured to take it from him, but the prisoner kept striking about with one hand, holding the deceased fast with the other, so that he could not disengage himself, but at last the latter made a vigorous effort, and by that means drew the prisoner from the ground, at which instant the prisoner gave him a blow, and the deceased immediately cried out, "The rogue has stabbed me to the heart, I am a dead man," and immediately expired; upon inspection afterwards it was found that besides two inconsiderable wounds, he had one in the left breast which was mortal: after great argument and consideration, the judges held this to be only manslaughter; *R. v. Snow*, 1 *Leach*, 151; they thought that there was not sufficient evidence to show that the prisoner laid in wait for the deceased, with a malicious design to provoke him, and under that colour to revenge the former quarrel by stabbing him, which would have been murder; but on the contrary, he had composed himself to work at his own door, on a summer's evening, and when the deceased appeared he never provoked him by word or gesture. 1 *East*, *P. C.* 245, citing *Foster's MS.* But where, upon an indictment for stabbing, with intent to murder, it appeared that the prisoner, having had some angry words with a third party, walked up and down the passage of a house with a sword stick in his hand, and the blade open, and was heard to say, "If any man strikes me, I will make him repent it;" he was desired to put up his stick, but he refused to do so; shortly after, the prosecutor came up, and ignorant of what had occurred, but perceiving that the prisoner was creating a disturbance, struck the prisoner twice with his fist, upon which the prisoner stabbed him: Parke, B., told the jury, that if a person receive a blow, and immediately avenge it with any instrument he may then have in his hand, the offence will be only manslaughter, provided the blow is to be attributed to the passion of anger arising from that previous provocation, for anger is a passion to which good and bad men are both subject; but the law in such a case requires, first, that there should be that provocation, and secondly, that the fatal blow should be traced to the

influence of passion, arising from that provocation ; here no doubt there was a violent assault, but the question was, whether the blow given by the prisoner was occasioned by the passion of anger excited by that assault ; if a person denote by the manner in which he avenges a blow, that he is not excited by a sudden transport of passion, but under the influence of that wicked disposition, that bad spirit, which the law terms "malice" in the definition of murder, then the offence would not be manslaughter ; suppose, for instance, a blow given, and the party struck beat the other's head to pieces by cruel and repeated blows, this could not be attributed to anger, and the killing would be murder ; and in like manner, if before a blow is struck, there appear to be a determination to punish any man who gives a blow, with such an instrument as this, and upon a blow being struck, a wound is inflicted accordingly, it is impossible to attribute the wound so given to the passion of anger arising from the blow ; none but a man of a wicked and cruel disposition, would determine beforehand to resent a blow with such an instrument. *R. v. Thomas, 1 Car. & P. 817.* Where, upon an indictment against one Ayes for murder, it appeared that Ayes and the deceased were both prisoners of war ; that the deceased having stolen a tobacco box from a fellow-prisoner, the prisoners generally were much incensed at it ; and as the deceased passed the beer table where Ayes was sitting, Ayes, who was very drunk, went up to the deceased, pushed with great force against his breast with both his hands, and the deceased fell on his back on the ground ; the deceased then arose, struck Ayes two or three blows with his doubled fist in the face, and one blow on the eye, upon which the prisoner again pushed the deceased to the ground, stamped with his foot on his stomach and belly with great force two or three times, and when the deceased arose, Ayes gave him a violent kick in the face ; death, however, was caused by the stamping on the stomach and belly : the jury (half foreigners) found Ayes guilty of murder ; but the case being referred to the judges, they were of opinion that the offence was only manslaughter. *R. v. Ayes, R. & Ry. 168.* Where two persons fought, and one knocked the other down, and then knocked him down a second time and kicked him whilst he was down, and then put a rope round his neck and dragged him into a ditch where he left him, and he was strangled : Patteson, J., held this to be murder. *R. v. Shaw, 6 Car. & P. 372.*

If a man come up whilst two others are fighting upon a private quarrel, whether sudden or malicious, and take part with one and kill the other, this will be manslaughter only ; 1 *Hawk. c. 31, ss. 56* ; unless he used some unfair advantage, such as striking with a deadly weapon, whilst the other was unarmed, or the like ; See *R. v. Langden, R. &*

Ry. 228, or unless the party killed were an officer, and in the due execution of his office at the time, 1 *Hawk.* c. 31, s. 57, in which case the offence would be murder. *See post*, p. 236. So, on the other hand, if the party so coming be killed, it is manslaughter only; 1 *Hawk.* c. 31, s. 47; but if, instead of taking part in the quarrel, he seek to part the combatants (giving them notice of his friendly intention,) and put an end to the affray, and in doing so he be killed, it is murder. *See post*, p. 237. 239.

But in all these cases of sudden anger, and indeed in every case of homicide upon provocation, how great soever that provocation may be, if there be sufficient time for passion to subside, and for reason to interpose, before the mortal blow is given, the homicide will be murder. *Fost.* 296. 1 *Hawk.* c. 31, s. 40. If a man find another in the act of adultery with his wife, and in the first transport of passion kill him, this is manslaughter; 1 *Hale*, 486, *ante*, p. 228; but if he kill him after the fact, and after a sufficient time for his passion to cool has intervened, it is murder. *Fost.* 296. If a man find his wife in the act of adultery, and in the first transport of passion kill her, it is manslaughter; but if he kill her from a suspicion, however strong or well-founded, that she is carrying on an illicit intrigue with another man, such killing will be murder. *R. v. Kelly*, 2 *Car. & K.* 815, *per Rolfe*, *B.* Whether a sufficient time for the angry feeling to have subsided have intervened, must in a great measure depend upon the particular circumstances of each case. Where it appeared that the prisoner and the deceased with others were engaged in playing at hazard, and some angry words passing, the prisoner called the deceased an impertinent puppy, and the deceased called the prisoner a rascal, upon which the prisoner threw a bottle at deceased, which barely touched him, and the deceased in return threw a candlestick or bottle at the prisoner, which missed him; and both parties immediately arose to get their swords, which were in the room, and the deceased drew his, but the prisoner was prevented from doing the same by the company; they then sat down for about an hour; the deceased then said to the prisoner, "We have had hot words, you were the aggressor, but I think we may pass it over," and offered the prisoner his hand, but the prisoner answered, "No, damn you, I will have your blood;" the reckoning being then paid, all the parties left the room, except the prisoner, who called after the deceased and said, "Young man, come back, I have something to say to you," upon which the deceased went back, the door was bolted, they fought with swords, the deceased was wounded, and afterwards died of the wound; it was proved also that after the throwing of the bottle, there was no reconciliation between the parties: the judges held this to be murder, as the prisoner had acted upon

malice and deliberation, and not from sudden passion. *Major Onoby's case*, 2 *Str.* 766. 2 *Ld. Raym.* 1485. In Bromwick's case (1 *Lev.* 180, 1 *Sid.* 277), who was indicted for aiding and abetting Lord Morley, in the murder of Hastings, it appeared that when the quarrel happened at a tavern, Lord Morley objected to fight at that time, on account of the disadvantage he should have by reason of the height of his shoes; and presently afterwards they went into the field and fought: this was relied on as showing that he did not fight in the first transport of passion. 1 *East*, *P. C.* 255. Where, upon an indictment for murder, it appeared that the deceased was requested by his mother to turn the prisoner out of her house, which, after a short struggle he effected, and in doing so, gave the prisoner a kick; the prisoner said he would make him remember it, and went immediately to his lodgings, two or three hundred yards off, passed through his bed room and a kitchen into a pantry, and then returned hastily; about five minutes after the deceased had turned the prisoner out, he went after him for the purpose of giving him his hat which the prisoner had left behind him, and he met him about ten yards from his lodgings, when they were heard to have some conversation, but without any words of anger, and they walked on together about fifteen yards, when the deceased gave him his hat, and then the prisoner exclaimed with an oath that he would have his rights, and immediately stabbed the deceased with some sharp instrument, giving him two mortal blows in the belly, and said he had served him right; the prisoner then immediately ran back to his lodgings, passed hastily through his bed room and the kitchen into the pantry, and thence back to his bed room, where he undressed himself and went to bed; soon afterwards he was apprehended, and four knives, such as the prisoner used in his trade of a butcher, were found in the pantry: Tindal, *C. J.*, after leaving it to the jury to say whether the offence was committed by the prisoner whilst smarting under the recent provocation, or whether there had been time for his anger to cool and reason to resume its seat, said, that it would be for them to consider whether the prisoner had shown thought, contrivance, and design in the mode of possessing himself of the weapon, and again replacing it immediately after the blow was struck, for the exercise of contrivance and design denoted rather the presence of judgment and reason, than of violent and ungovernable passion. *R. v. Hayward*, 6 *Car. & P.* 157, and see *R. v. Lynch*, 5 *Car. & P.* 324

In cases of this kind however, if there appear to have been previous malice, on the part of the slayer, no matter how sudden the quarrel or fight, the killing is murder, 1 *Hawk. c.* 31, *s.* 26, unless it can be proved that the parties were since reconciled, and that the fight was on a fresh cause of quarrel. *Id. s.* 30. But if it appear that the reconciliation was feigned

or pretended, and that the hurt was really done on the old malice, it is murder. 1 *Hale*, 451. Where upon an indictment for murder, it appeared that the prisoner and the deceased, brothers, were drinking in a friendly way at a public house with some neighbours, till growing warm in liquor, but not intoxicated, the prisoner and the deceased began in idle sport to pull and push each other about the room, then wrestled one fall, and soon after played at cudgels by agreement; all this time no tokens of anger appeared on either side, until the prisoner in the cudgel play gave the deceased a smart blow on the temple, upon which the latter grew angry, and throwing away his cudgel, closed with the prisoner, and they fought a short time in earnest, until they were separated by the company; the prisoner quitted the room in anger, and when he got into the street was heard to say, "Damnation seize me if I do not fetch something and stick him," and being reprov'd for this, he said, "I'll be damned to all eternity if I don't fetch something and run him through the body;" in about half an hour he returned, and stood leaning against the door post, with his left hand in his bosom and a cudgel in his right, looking in upon the company, but not speaking; the deceased asked him to come in, but he refused; the deceased said, "Why will you not?" The prisoner answered, "Perhaps you will fall on me and beat me;" the deceased assured him that he would not, adding, "Besides you think yourself as good a man as me at cudgels, perhaps you will play at cudgels with me," to which the prisoner answered, "I am not afraid to do so, if you will keep off your fists;" upon these words the deceased got up and went towards the prisoner, who dropped the cudgel as the deceased was coming up to him; the deceased took up the cudgel, and gave the prisoner two blows with it on the shoulder; the prisoner immediately put his right hand into his bosom, took out the blade of a tuck sword, crying, "Damn you, stand off or I'll stab you," and immediately, without giving the deceased time to step back, made a pass at him, but missed him, upon which the deceased gave back a little, but the prisoner shortening the sword in his hand, leaped forwards towards the deceased, stabbed him to the heart, and he instantly died: the judges unanimously held this to be murder; there were so many circumstances of deliberate malice and revenge on the part of the prisoner, that the offence could not be less than murder. *R. v. Mason, Fost.* 132.

There is one species of combat, namely, deliberate duelling, where if death ensue, it is murder, under any circumstances; for it is deliberately undertaken, with deadly weapons, and the killing is deemed premeditated. 1 *Hawk. c.* 31, *s.* 21. *Fost.* 297. And it is deemed murder in the seconds as well as the principals. 1 *Hawk. c.* 31, *s.* 31. 1 *Hale*, 453. 441. Even the second of the party killed, may be indicted and convicted of murder, as being present, aiding and abetting the survivor in

killing the deceased. *R. v. Cuddy*, 1 *Car. & K.* 210. If indeed, upon a sudden quarrel the parties fight upon the spot, or even if they presently fetch their weapons, and go into the field and fight, and one of them be killed, it is manslaughter only, for it is presumed the blood never cooled. *Fost.* 297. 1 *Hawk. c.* 31, *s.* 29. *R. v. Walters et al.*, 12 *St. Tr.* 113. But if they appoint to fight the next day,—or even upon the same day, at such an interval that passion might have subsided,—or if from circumstances attending the case, it may be reasonably concluded that their judgment had controlled the first transports of passion before they engaged,—the killing will be murder. *Fost.* 297. 1 *Hawk. c.* 31, *s.* 22. Or if the suddenness of the fight be preconcerted, in order to evade the imputation of murder,—as if B. challenge A.,—and A. refuse to meet him, but in order to evade the law tells B. that he shall go the next day to such a town about his business, and accordingly B. meets him the next day on the road, assaults him, and they fight, and B. is killed,—this is murder. 1 *Hawk. c.* 31, *s.* 25.

Prize fighting and boxing matches are unlawful; and if death ensue, it is manslaughter. 1 *East*, *P. C.* 270; see *Fost.* 260. Where a man was challenged to fight, for a public trial of skill in boxing, and was even urged to it by taunts, and he fought and killed his adversary, this was holden to be manslaughter, although the occasion was sudden. *Ward's case*, 1 *East*, *P. C.* 270. And not only the person who kills, and the seconds, &c., but every person who by his presence at a prize fight encourages it, that is to say, who remains present during the fight, is equally guilty of manslaughter. *R. v. Murphy*, 6 *Car. & P.* 103, *per Littledale, J.* Also, all struggles in anger, whether by fighting, wrestling, or otherwise, are unlawful; and if death ensue, it will be manslaughter. *R. v. Canniff*, 9 *Car. & P.* 359.

5. Murder.

I have nearly exhausted this subject, under the preceding heads. I have shown that homicide by accident may in some cases amount to murder; *ante*, p. 216; and the like in homicide in furtherance of justice, (*ante*, p. 221), in homicide *as defendendo*, (*ante*, p. 223), in cases of homicide upon provocation (*ante*, p. 226), and in sudden combat (*ante*, p. 229). I have also treated of the subject generally, and particularly where the malice is express, in the evidence upon an indictment for murder, *ante*, pp. 213—215. It only now remains for me to notice the subject, under the following heads.

In killing officers of justice.] Officers of justice, whilst in the execution of their offices, are under the peculiar protection

of the law ; and killing them whilst so employed, is murder. *Fost.* 308. As to the duty of constables and other peace officers, in apprehending offenders without warrant, *see ante*, pp. 27, 21 ; in apprehending, with a warrant, *ante*, p. 30 ; in the prevention of offences, *ante*, p. 27. If, for instance, a constable be killed in endeavouring to part those whom he sees fighting, it is murder in the party killing. 1 *Hawk. c.* 31, ss. 48, 54. And this protection is not confined to the instant the officer is on the spot, and at the scene of action, engaged in the business which brought him there, but he is under the same protection of the law *eundo, morando et redeundo*. *Fost.* 308. And therefore if he come to do the duty of his office, and meeting with great opposition, retire, and in the retreat he be killed, this is murder. *Id.* 308. So, if he meet with opposition on his way to perform his duty, and be killed before he come to the place,—if such opposition be intended to prevent his doing his duty, (which is a fact to be collected from the circumstances appearing in evidence,)—this also will amount to murder. *Fost.* 309. And special constables, from the time of their appointment until their service is determined, are under the same protection. *R. v. Porter*, 9 *B. & C.* 593. Also, every person acting in aid of peace officers, whether commanded to do so or not, enjoy the same protection as the officers themselves ; *Fost.* 309 ; and killing them would equally be murder.

So, private persons interposing to prevent mischief in the case of an affray, or using their endeavours to apprehend felons or those who have given a dangerous wound, and to bring them to justice (*see ante*, pp. 21—27), are equally protected as peace officers, and the killing of them equally murder ; *Fost.* 309. 1 *Haw. c.* 31, ss. 48, 54 ; for those people are in such cases engaged in the discharge of a duty the law imposes upon them ; the law is their warrant, and they may, not improperly, be considered as persons engaged in the public service and for the advancement of justice, though not specially appointed to it ; and upon that account they are under the same protection as ordinary ministers of justice are. *Fost.* 309. *R. v. Price*, 8 *Car. & P.* 882. *R. v. Hunt*, *Ry. & M.* 93. And where, upon an indictment for stabbing with intent to murder, the prosecutor stated that his brother and the prisoner were fighting, and that he laid hold of the prisoner, to prevent him from striking his brother, and held him down, but did not strike him ; and that the prisoner then stabbed him with a knife above the knee : Parke, J., in summing up, told the jury that if they were of opinion that the prosecutor did no more than was necessary to restrain the prisoner from beating his brother, they should find the prisoner guilty, because in such a case, the crime, if death had ensued, would have been murder ; but if they thought that the prosecutor

had done more than was necessary, or if he struck any blow, it would in case of death have been manslaughter merely, and they must acquit the prisoner. *R. v. Bourne*, 5 Car. & P. 120. The rule however is not confined to those who are present, so as to have ocular proof of the fact, or to those who first come to the knowledge of it; for in these cases, if fresh suit be made, and *à fortiori* if hue and cry be levied, all who join in aid of those who began the pursuit, are under the same protection of the law as the others are, and stand precisely on the same footing. *Fost.* 309, 310. A robbery is committed, the country rise and pursue the robbers, who turn and make resistance, and in the struggle one of the robbers is killed, this, on the part of the pursuers, is justifiable homicide; but if one of the pursuers be killed by the robbers, it is murder. *Fost.* 310. 1 *Hale*, 464. In arresting upon suspicion, however, a private person had need to be cautious, unless it be upon hue and cry. Upon hue and cry raised or levied against a man by name, no doubt, a private person may arrest the alleged offender, 2 *Hawk.* c. 12, s. 4, although no other circumstance of suspicion attach to him; 2 *Inst.* 52; and the killing of the private person would in that case be murder. *Fost.* 318. But otherwise, a private person, arresting a man on suspicion of having committed a felony, however well grounded the suspicion may be, will not be protected, if in fact no felony was committed; *Fost.* 318; and see *Beckwith v. Philby*, 6 B. & C. 635; and *ante*, p. 25; or if a felony were committed, but not by the party arrested or attempted to be arrested, the death of either, the party arresting or arrested, would be manslaughter. *Fost.* 318. So that a private person should be cautious not to interfere, where the law does not allow of his doing so. Where a man was suspected of stealing turnips, and the owner ordered his servant to watch him, who apprehended him shortly afterwards in an adjoining field with turnips in his possession; the servant took him to the farmer's, and was taking him thence to a constable's, when he drew a knife and wounded the servant: being indicted for this, it was objected that the servant had no legal authority to arrest the prisoner, the stat. 7 & 8 G. 4, c. 29, s. 63, giving him that authority only in case the prisoner was found stealing the turnips (*see ante*, p. 21); consequently if death had ensued, the offence would have been manslaughter only, not murder: Vaughan, B., was of that opinion, and also that the servant had no right to take the prisoner to the farmer's or constable's, but should have taken him directly before a magistrate; the prisoner was acquitted. *R. v. Curran*, 3 Car. & P. 397. Where a private person is acting in aid of a constable, he is entitled to the same protection as a peace officer, *cundo, morando et redeundo*. *R. v. Phelps*, 1 Russ. 534.

Also in civil suits, the officer who executes the process of the courts, is entitled to the same protection, as an officer of justice in criminal cases. *Fost.* 310; 1 *Hawk. c.* 31, *s.* 61. He must however be a legal officer, that is to say, he must be the person to whom the writ or warrant is directed, or his assistant, and he must be within his proper district at the time he executes or attempts to execute it; otherwise, if in a struggle he be killed, it is manslaughter only. 1 *Hale*, 457—459. The writ or process also must be legal, that is, it must not be defective in the frame of it, and must have issued in the ordinary course of justice from a court or magistrate having jurisdiction in the case. *Fost.* 311; see 1 *Hawk. c.* 31, *s.* 62. 64. There may have been error or irregularity in the proceeding previously to the issuing of the process; but if the sheriff or minister of justice be killed in the execution of it, it will be murder, for the officer to whom it is directed must execute it at his peril. *Id.* And therefore if a *capias ad satisfaciendum*, *fieri facias*, writ of assistance, or any other writ of the like kind, issue, directed to the sheriff, and he or any of his officers be killed in the execution of it, it is sufficient upon an indictment for this murder, to produce the writ and warrant, without showing the judgment or decree. *Roger's case, per Ld. Hardwick, Fost.* 311, 312. And the officer must also give the party notice of his authority, to bring himself thus within the protection of the law, 1 *East, P. C.* 319, *s.* 84, unless indeed the party already know it. *Id.* *s.* 85. Where a sheriff's officer, early in the morning, pushed abruptly and violently into a gentleman's chamber, in order to arrest him, but not telling his business, nor using words of arrest, and the gentleman, not knowing he was an officer, under the first surprise, took down a sword which hung in the chamber, and stabbed him: this was holden to be manslaughter. 1 *Hale*, 470; *Fost.* 298, 299. In a late case, where a sheriff's officer was in possession of goods under an execution, and the owner and others gave him an excessive quantity of spirits to make him drunk, and then put him into a hackney carriage, with orders that he should be driven about the streets, and after being so driven about two hours, he was found to be dead: Parke, B., told the jury that if they were satisfied that the parties made the deceased drunk for the unlawful purpose of preventing the completion of the execution, or, he being drunk, they put him into the carriage for the like purpose, it was manslaughter. *R. v. Packard et al., Car. & M.* 236.

So, in criminal cases, where an officer or private person interferes to put a stop to an affray or riot, it is necessary that the parties concerned in the affray or riot should have notice of the intent with which such person interferes, to make the

offence of killing him amount to murder ; *Fost.* 310 ; otherwise it will be manslaughter only. 1 *Hawk. c.* 31, *s.* 49. And the like in all cases of apprehension for offences, except where the party is apprehended in the actual commission of the offence, or on fresh pursuit. If a constable be thus acting within his own district, in the day time, it will be sufficient if he produce his staff, for he is presumed to be known there ; but in the night time, he must do more, he must command the peace, or give other notification of his business. *Fost.* 310, 311. Other peace officers, both at day and night, must command the peace, or in other manner declare the intention with which they interfere. *Fost.* 310. And private persons must give express notice of their friendly intent. *Fost.* 311. If this be done, killing the party so interposing will be murder. But in all other cases except riot and affray, where a man is taken or attempted to be taken whilst in the actual commission of the offence, or on fresh pursuit, it is not necessary to give him notice, for the nature of the case itself must sufficiently indicate to him the reason why he is apprehended. *R. v. Howarth, Ry. & M.* 207 ; *R. v. Payne, Id.* 378 ; *R. v. Davis, 1 Car. & P.* 785.

In acting under a warrant of a justice of the peace, if it be in a matter in which the justice had jurisdiction, the officer is justified and fully protected by law in executing it, although it may have been obtained by gross imposition on the magistrate, and by false information in respect of the matters suggested by it. *Fost.* 312. If A., a police officer, have a warrant from a proper magistrate for the apprehension of B. by name, upon a charge of felony,—or if B. stand indicted for felony,—or if the hue and cry be levied against B. by name :—in these cases, if B., though innocent, fly, or turn and resist, and in the pursuit or struggle be killed by A., or any person joining in the hue and cry, the person killing will be indemnified ; but if A. or any person joining in the hue and cry be killed by B. or any of his accomplices in that outrage, it will be murder ; for A. and those joining with him were, in this instance, in the discharge of a duty which the law required from them, and liable to punishment in case they wilfully neglected it. *Fost.* 318. Where a process in the nature of a *capias ad satisfaciendum* issued from the town court of Newcastle-upon-Tyne against one Cowling, directed to Dixon, a serjeant at mace, and he got another serjeant at mace of the name of Surtees to execute it for him ; Surtees made the capture, but Cowling escaped ; Dixon then prevailed on the officer of the court to insert Surtees' name in the process, and this being done, Surtees obtained an escape warrant from a magistrate, to apprehend Cowling, upon an information on oath that by virtue of this process to him and Dixon directed, he arrested Cowling, who by wrestling and blows got out of his hands,

and escaped ; with this escape warrant Dixon, Surtees, and one Atkinson went to the workshop of Cowling, which they found shut, but they called on Cowling (who with one Curtis was within), demanding admittance, saying that they had an escape warrant against him, and that if the door were not opened, they would break it open ; Cowling, however, refused to surrender, and Curtis opening a window, with an axe in his hand, swore that the first man that entered should be a dead man ; the officers then broke open the door, and Atkinson entering first, Curtis hit him a blow with the axe on the side of the head and killed him : Curtis being indicted for murder, and found guilty, the case was reserved for the opinion of the judges, and ten of the twelve held clearly that it was murder ; the warrant was good though obtained upon an information that was false, and the officers had a right to break open the door, after having demanded admittance, and being refused ; besides, Curtis's coming to the window, showing the axe, and declaring that the first person who entered should be a dead man, showed that his subsequent act was deliberate as well as cruel, and the offence therefore was clearly murder. *R. v. Curtis, Fost. 135.* Where one Pratt obtained a warrant, directed to the constable of Pattishall, to apprehend Gordon for an assault, and Pratt delivered it to Linnell, the constable of Pattishall, to be executed, who in attempting to arrest Gordon, was killed by him : and upon Gordon being indicted for the murder of Linnell, it was proved that the deceased went to the prisoner's house in the day time to execute the warrant, that he gave notice of his business and had his staff with him, and that he had acted and was generally known as constable of the parish : the judges held this to be sufficient evidence and notice of Linnell's being constable, although there was no proof of his appointment, or of his being sworn into office. *Gordon's case, 1 East, P. C. 315.* But where a warrant against D., directed to A., a constable, was given by him to his sons B. and C. to execute, A. staying behind ; they found D., lying under a hedge, with a knife in his hand, running the blade of it into the ground ; he got up to run away, but B. got hold of him and he immediately stabbed B. with the knife ; the father, A., was at the time in sight, about a quarter of a mile off : Parke, B., told the jury that the arrest was illegal, as the father was too far off to be assisting in it, and there was no evidence that the prisoner had prepared the knife beforehand to resist illegal violence ; if a person receive illegal violence, and he resist that violence with anything he happen to have in his hand, and death ensue, that would be manslaughter. *R. v. Patience, 7 Car. & P. 775.*

But if the process be defective in the form of it, as if there be a mistake in the name of the person on whom it is to be executed,—or if the name of such person or of the officer be

inserted without authority, or after the issuing of the process, —or if the officer exceed his authority, — the killing of the officer in such case by the party would be manslaughter only. *Fost.* 312. Where upon an indictment for stabbing, with intent to murder, it appeared that the prosecutor, a constable, in attempting to arrest the prisoner, was stabbed by him ; but it appearing that the warrant which authorized the arrest, did not state the prisoner's christian name, but merely described him as "—— Hood, of Bemerton, in the parish of Fugglestone, in the county of Wilts, son of Samuel Hood,"—the judges held the warrant to be bad, as omitting the prisoner's christian name, and not assigning any reason for the omission ; and that therefore if death had ensued it would have been manslaughter only, and consequently the prisoner ought to be acquitted. *R. v. Hood, Ry. & M.* 281. So, a warrant against John H. will not justify the constable in apprehending Richard H., although Richard be really the person intended, and the name of John were inserted by mistake. *Hoye v. Bush*, 1 *Man. & Gr.* 775. So, a warrant against J. S. Knight, will not justify the officer in apprehending J. S. Baronet, 1 *Hawk. c.* 31, *s.* 64, because "Baronet" is parcel of the name, and Knight is not. So a blank warrant omitting the name altogether, would be bad. Where the under-sheriff of Staffordshire, was in the habit of leaving blank warrants, sealed, with one Deacle, who acted for him, to fill up as occasion might require, and Deacle made out a warrant on a writ against one Stockley, inserting Stockley's name, and delivered it to Welch the officer, and Welch afterwards added the names of Clewes and Davil to it : Welch, in endeavouring to execute the warrant, was killed by Stockley ; and Stockley being indicted as for murder, the judges held that it was only manslaughter. *R. v. Stockley*, 1 *East, P. C.* 310. But where a magistrate was in the habit of keeping by him a number of blank warrants, ready signed, and on being applied to, filled up one of them, and gave it to a constable, who, on endeavouring to arrest the party, was killed : it was holden that this was murder in the person killing the officer, and he was executed. 8 *T. R.* 454, *cit. by Ld. Kenyon*, 1 *Russ.* 621.

If a constable or other person, without warrant, apprehend or attempt to apprehend an offender, in a case where by law he may do so, (*see ante.* p. 21. 25,) and he be killed in so doing, it will be murder. Where upon an indictment for shooting at a constable, and cutting him on the head, with intent to murder, &c., it appeared that the prisoner was given in charge to a constable named Freeman, for having a forged note in his possession ; and upon Freeman attempting to handcuff him, the prisoner fired a pistol at him, and wounded him severely ; he then attempted to escape, but Freeman overtook him, and in a struggle between them, the prisoner struck Freeman

several times on the head with the cock of the pistol, and cut him ; he escaped, but was soon retaken, and he then expressed great disappointment at not having killed Freeman : it was objected for the prisoner, that the charge on which he was taken into custody, namely, having a forged note in his possession, without more, imported no legal offence, and did not justify the constable in apprehending him, and consequently if death had ensued it would not have been murder : but the judges held, that although the charge was defective, the defect was not material ; that it was not necessary that a charge of that description should contain the same accurate description of the offence as an indictment, and that the charge in the present case must be considered as imputing to the prisoner a guilty possession ; and that if death had ensued it would have been murder. *R. v. Ford, R. & Ry. 329.* So, where a person charged a watchman to apprehend the prisoners, whom he accused of attempting to rob him, and the watchman accordingly pursued and overtook the prisoners, and required them to come back with him, without, however, stating what charge he had against them ; one of the prisoners, having drawn some sharp instrument, sprung at the watchman, and caught hold of one of the skirts of his coat ; the watchman (whom the prisoners knew to be so) then turned upon the prisoners, drew his staff, and the prisoners came at him ; the watchman struck one of them, who immediately stabbed him, and the other immediately attempted to stab him with a knife ; where the alleged attempt to rob was made, was within the place for which the watchman was appointed, but where he was stabbed was without it : nine of the judges held that the watchman could legally arrest the prisoners, without saying that he had a charge of robbery against them, although the prisoners had in fact done nothing to warrant the arrest, and that if death had ensued it would have been murder ; three of them were of a contrary opinion. *R. v. Woolmer et al., Ry. & M. 334.*

But if a constable or other person apprehend or attempt to apprehend an offender, where by law he is not authorized to do so, and be killed in doing it, the killing will be manslaughter only, not murder. Where a workman being refused his wages, because he had not finished his work, was very abusive to his master, the master gave charge of him to a constable, and the constable being about to take him, telling him that his master had given charge of him, and that he must go with him (the constable), the man, without saying a word, stabbed the constable with a knife, and ran away : being indicted for stabbing with intent to murder, the judges held that if death had ensued it would have been manslaughter only, as the constable had no right to arrest the prisoner ; and therefore the prisoner ought to be acquitted. *R. v. Thompson, Ry. & M. 80 ; and*

see *R. v. Curran*, *ante*, p. 238. Where a constable without warrant, attempted to apprehend a man in the evening, for an act of vagrancy committed by him early in the afternoon, and the man resisted, and in the struggle stabbed the constable with a knife which he took out of his pocket : being indicted for stabbing with intent, &c., the judges held that the constable had no right to make the arrest ; the vagrant act gave him authority to arrest only when the party is found committing an act of vagrancy, and to take him forthwith before a magistrate, so that he must be taken in the act or on fresh pursuit, and here many hours intervened between the act done and the attempt to arrest for it ; it would therefore be manslaughter only if the constable had been killed, and consequently the case was not within the statute of stabbing. *R. v. Gardener*, *Ry. & M.* 390.

As to breaking open doors, &c., to make an arrest:—in civil cases, an officer cannot break open an outer door or a window, to arrest the occupier or any of his family, who have their residence there ; but after entering at the outer door, the same being opened to him, he may break an inner door if that be necessary. *Fost.* 319, 320. This rule, however, as to not breaking an outer door, extends only to the case of an original arrest ; for if the party be arrested out of the house, and escape, and take refuge even in his own house, the officer on fresh pursuit may break open doors in order to retake him, first giving due notice of his business, demanding admission, and being refused. *Fost.* 320. Nor does the rule extend to the house of a stranger at all. *Fost.* 320. But the officer, in breaking or entering the house of a stranger, to make an arrest, does so at his peril ; if the party he seeks to arrest be there, he is justified ; if he be not, he is not justified. 2 *Hale*, 117 ; see *Johnson v. Lee*, 6 *Taunt.* 246. *Lloyd v. Sandilands*, 2 *Moore*, 207.

But in criminal cases, where a felony has been committed or a dangerous wound given, or even where an officer of justice comes armed with a process founded on a breach of the peace, the party's own house is no sanctuary for him ; doors in any of these cases may be forced, the notification, demand, and refusal above mentioned having been previously made. *Fost.* 320. See other cases, also, *ante*, pp. 28, 29. But a bare suspicion of the guilt of the party, will not warrant the officer in proceeding to this extremity, unless he have a warrant against him. *Fost.* 321.

If an officer in breaking open doors to make an arrest, be opposed, and in the struggle be killed,—if he were justified in doing so, the killing will be murder ; *Baker's case*, 1 *East*, *P. C.* 323 ; if not, manslaughter only. 1 *Hawk. c.* 31, *s.* 65. 1 *Hale*, 458. *Cook's case*, *Cro. Car.* 537.

In killing gamekeepers.] By stat. 9 G. 4, c. 69, s. 1, "If any person shall by night, (that is from the expiration of the first hour after sunset, until the beginning of the last hour before sunrise, s. 12), unlawfully take or destroy any game or rabbits, in any land whether open or inclosed;—or shall by night unlawfully enter or be in any land whether open or inclosed, with any gun, net, engine, or other instrument, for the purpose of taking or destroying game:—"he is subject on summary conviction to certain imprisonment.

And by sect. 9, "if any persons to the number of three or more together, shall by night unlawfully enter or be in any land, whether open or inclosed, for the purpose of taking or destroying game or rabbits, any of such persons being armed with any gun, cross-bow, fire-arms, bludgeon, or any other offensive weapon,"—he is guilty of a misdemeanor, and subject on indictment to transportation or certain imprisonment.

And by sect. 2, where any person shall be found upon any land, committing any such offence as hereinbefore mentioned (*see sect. 1, supra*), it shall be lawful for the owner or occupier of such land,—or for any person having a right or reputed right of free warren or free chase thereon,—or for the lord of the manor or reputed manor wherein such land may be situate,—and also for any gamekeeper or servant of any of the persons herein mentioned, or any persons assisting such gamekeeper or servant,—to seize and apprehend such offender upon such land, or, in case of pursuit being made, in any other place to which he may have escaped therefrom, and to deliver him, as soon as may be, into the custody of a peace officer, in order to his being conveyed before two justices of the peace. This section, it will be perceived, had reference to the offences described in the first section: but as in committing offences within the ninth section, each offender commits an offence within the first section, it has been holden that this second section gives authority to apprehend persons committing offences, as well against the ninth section as against the first. *R. v. Wm. Ball, Ry. & M.* 330.

And if a gamekeeper or his assistant or other person here authorized, be killed in attempting to apprehend a poacher, under the circumstances here mentioned,—if the arrest would have been lawful, the offence is murder; if unlawful, the offence is manslaughter only. Where upon an indictment for maliciously shooting with intent to murder, it appeared that some gamekeepers attempted to apprehend the prisoners, who were poaching, when the prisoners pointed their guns at the keepers, and one of them fired, and wounded one of the keepers: it was objected that as the gamekeepers were only permitted, not enjoined, by statute, to apprehend persons poaching, their case was analagous to that of a private person

arresting on a suspicion of felony, in which case killing him would be manslaughter only, not murder : but Vaughan, B., held that the statute which gave gamekeepers authority to apprehend persons poaching, put them on a footing with constables for that purpose, and gave them the same protection ; and that killing them in the lawful execution of their duty, would be murder, not merely manslaughter. *R. v. Edmeads et al.*, 3 Car. & P. 390. So, where a gentleman's gamekeeper and assistants, finding twenty-two poachers in a coppice of their master, warned them off, and followed them to the turnpike road, where the poachers stopped and insisted that the keeper, &c., should go no further ; the keeper said that he would shoot the first man who should break the peace ; upon which the poachers rushed upon the keeper and his assistants, one of them struck the keeper a blow with a pole, and the keeper knocked him down ; another made a blow at him with a pole, and the keeper knocked him down ; another struck the keeper on the head, and he knocked him down ; a gun was then fired by one of the poachers, which wounded one of the assistants : —one of the poachers being taken and indicted for this offence, it was objected for him, that as the keeper had knocked down three of the poachers, before the gun was fired, the prisoner could not be convicted, for the offence would have been manslaughter only, if death had ensued : but the judges held that notwithstanding the blows given by the keeper, it would have been murder if the keeper's assistant had died. *R. v. Wm. Ball, Ry. & M.* 330. *S. P. R. v. James Ball et al., Ry. & M.* 333. Where three prisoners were indicted for murder, and it appeared that some gamekeepers found two of them poaching, who after some little struggle stood still, but called to the third prisoner, who then came up, and with a stick shod with iron, beat the keepers on their heads, killed one of them, and rescued the two prisoners : Vaughan, B., held this to be murder in all. *R. v. Whithorne et al.*, 3 Car. & P. 394.

And in these cases, it is not necessary that the keepers, &c., should previously declare who they are, or give the poachers to understand why they attempt to apprehend them. Where the assistants of a gamekeeper found poachers upon the lands of their master in the night time, and pursued them ; upon which the poachers turned round, and one of them fired at one of the assistants and shot him in the thigh : it was objected that the assistants gave no notice to the poachers, as by calling on them to surrender, or the like, and therefore if death had ensued it would have been manslaughter only ; but the judges held that the circumstances of the case constituted sufficient notice, the parties being in the very act of committing the offence for which they were liable to be apprehended. *R. v. Payne et al., Ry. & M.* 378. *S. P. R. v. Davis*, 7 Car. & P. 785.

To make the apprehension or attempt to apprehend poachers lawful, it must be made by some person having authority to apprehend, under stat. 9 G. 4, c. 69, s. 2, above mentioned. And a "watcher" has been holden to be within the meaning of that section. *R. v. Price*, 7 Car. & P. 178. But where the gamekeepers of a Mr. Clive found several poachers in a wood, and pursued them, when one of the poachers turned round and shot one of the keepers; and being indicted for it, it appeared in evidence that the wood did not belong to Mr. Clive, but he had only the permission of the owner to preserve game there: Patteson, J., held that the keepers had no legal authority under stat. 9 G. 4, c. 69, s. 2, to apprehend those poachers, Mr. Clive not being the owner or occupier of the wood, or lord of the manor, &c., and that therefore the offence was not murder, but manslaughter only. *R. v. Addis*, 6 Car. & P. 388. *S. P. R. v. Davis*, 7 Car. & P. 785.

And the poachers must be found upon land, open or inclosed, in the act of committing some offence within the 1st or 9th sections of stat. 9 G. 4, c. 69, *ante*, p. 245. But where a gamekeeper and his assistants, after hearing shots fired in a wood belonging to their master, saw the prisoners come in the direction from it, one of whom had a gun; the keeper called to his assistant to take care of the gun, and the assistant thereupon went to the man who had the gun, and gently took hold of it near the lock, and took off the percussion cap; the keeper then pretending to call out to some other person to come forward, the three other men fell upon the keeper and his assistant, knocked them down, and they became insensible; when the keeper came to himself, all the prisoners were passing him, and one of them said, "Dam 'em we've done 'em both," and having passed on a few yards, one of them returned, and with some instrument he had in his hand, he gave the keeper a violent blow on the leg, which cut through the gaiter, and wounded him: it was objected at the trial, that as only one had given the blow on the leg, he alone was guilty; but the judge told the jury that if they were of opinion that the prisoners were acting in concert, they were all equally guilty: afterwards, before the judges, it was objected, that as the keeper did not find the prisoners in the wood, he had no right to stop them, and the assistant's doing so by taking hold of the gun, was sufficient provocation to reduce the case from murder to manslaughter, if death had ensued; but the judges held the conviction right. *R. v. Warner, Albone, Butler, & Chasham*, Ry. & M. 380. 5 Car. & P. 525. See as to killing upon slight provocation, *ante*, p. 226.

And the poachers must be found on the land, committing the offence in the night time, that is to say, from the expiration of the first hour after sunset, until the beginning of the last hour before sunrise. *Ante*, p. 245. And where a gamekeeper

hearing a shot fired in a plantation of his master, saw the prisoner there, who dropped a hen pheasant; the keeper went towards him, and he fired at him; but at the trial the keeper could not swear that this was before eight o'clock in the morning; and it was then objected, that as it was not shown that the prisoner was in the plantation in the pursuit of game one hour before sunrise, the keeper had no right to apprehend him; and the objection was holden good. *R. v. Tomlinson*, 7 Car. & P. 183.

In impressing seamen.] To render the impressment of a seaman legal, there must be a legal warrant from the Lords of the Admiralty; the warrant must be executed by a proper officer; and the parties impressed must (in the usual terms of the warrant) be "seamen, seafaring men, and others whose occupations and callings are to work in vessels and boats, upon rivers." See the form of the warrant, *Fost.* 156.

1. There must be a legal warrant; if there be none, and the party impressing be killed, it is manslaughter only. See *Hugget's case*, *Kel.* 59. If the party impressed be killed, it is murder. If on the other hand, there be a legal warrant, and it be executed legally, and the person impressed be a proper object of impressment, if the officer or any of the men acting under his immediate orders be killed, it is murder; 1 *East*, *P. C.* 308; if in the struggle the party impressed be killed, it is justifiable homicide; but if the party impressed be killed in flight, it will be manslaughter at least, perhaps murder, in the same manner as in cases of misdemeanor. 1 *East*, *P. C.* 308. See *ante*, p. 222.

2. The warrant must be executed by the proper officer. The warrant requires that the person entrusted with the execution of it, must be a commissioned officer, expressly deputed in writing endorsed on the warrant, under the hand and seal of the officer to whom the warrant is directed. Where the warrant was directed to the captain of a man-of-war, and he deputed his lieutenant, but neither were present when some seamen of the ship, by their verbal orders, attempted to impress a seaman, who resisted and killed one of the pressgang: this was holden to be manslaughter only; *Bradfoot's case*, *Fost.* 154; if the seaman had been killed, it would have been murder. *Dixon's case*, 1 *East*, *P. C.* 313. See *Borthwick's case*, 1 *Doug.* 207.

3. The party impressed must be a "seaman, seafaring man, or other whose occupation or calling is to work in vessels or boats on rivers." *Supra*. Therefore, where the mate and some seamen of a ship of war, in the absence of the deputed officer, attempted to impress one How, who was servant to a tobaccoist, and never was a mariner, and How made some resistance, and took out his knife, when one of the seaman hit

him a violent blow on the side of the head, with a large walking stick, having a great knob at the end of it, and he died of it: this was holden to be murder, because the party was not liable to be impressed, and the deputed officer was not present and acting in the impressment. *Dixon's case, supra.* So, where a warrant was directed by the Admiralty to Lord Danby to impress seamen, and one Browning, his servant, without any warrant in writing, impressed a person who was no seaman, who, trying to escape, was killed by Browning; this was adjudged to be murder. 1 *East, P. C.* 312.

6. *Principals and Accessories.*

Principals.] If two persons be present, each aiding and abetting the other, either in the commission of a homicide,—or in the commission of some other offence, in the prosecution of which a homicide is committed,—the one who kills is principal in the first degree, and the other guilty as principal in the second. In the case of a duel, from which death ensues, the seconds,—as well the second of the party killed, as the second of the party killing,—are guilty of murder, as principals in the second degree. 1 *Hawk. c.* 31, *s.* 31. *R. v. Young*, 8 *Car. & P.* 644. *And see ante*, p. 235. So, in the case of a prize fight, if death ensue, not only the seconds, but all those who were present looking on, are guilty of manslaughter. Where it appeared that the prisoner was present at a prize fight, in which one of the parties was killed, but there was contradictory evidence whether he acted as second or not; and it was also doubtful whether the deceased came by his death from blows received by him in the fight, or received by him from individuals among the mob, who had broken the ring several times and beaten many persons with sticks: *Littledale, J.*, held, that, whether the prisoner acted as second or not, if he encouraged the combatants by his presence, he must be deemed a principal in the second degree; but he desired the jury to consider whether the deceased met with his death in the fight or from the mob, for if the latter, the prisoner must be acquitted, it being proved that he had no stick upon the occasion, and that he was not one of those who broke in the ring: the jury found him guilty. *R. v. Murphy*, 6 *Car. & P.* 103. But where in such a case it was objected that all the prisoners were present at the fight, and so principals in the second degree, and that their evidence therefore, as in the case of accomplices, required confirmation: *Patteson, J.*, held, that although they were principals in the second degree, yet they could not be deemed such accomplices as required their testimony to be confirmed by other evidence. *R. v. Hargraves*, 5 *Car. & P.* 170.

Also, where divers persons resolve generally to resist all

opposers, in the commission of any breach of the peace, and to execute it in such a manner as may naturally tend to raise tumults and affrays,—as by committing a violent disseisin, or the like,—and in so doing happen to kill a man : they are all guilty of murder ; for those who wrongfully engage in such bold disturbances of the public peace, in open opposition to, and defiance of, the justice of the country, must at their peril abide the event of their actions. 1 *Hauck. c.* 31, *s.* 51. So, in the case of a riot or affray, if a constable be present, and interfere to prevent it, first producing his staff of office, or in other manner giving notice of his authority and of the intent with which he interposes, if he be resisted and he or any of his assistants be killed, it will be murder in every man who joined in such resistance. *Fost.* 311. 1 *Hale*, 461—463. *Young's case*, 4 *Co.* 40 *b.* *R. v. Tyler*, 8 *Car. & P.* 616. So, if a robbery be committed, and the country upon notice rise and pursue the robbers, who turn and make resistance, and in the struggle one of the pursuers be killed by the robbers or any of them, this will be murder in the whole gang joining in such resistance, whether present at the murder or at a distance, but taking part in the resistance. *Fost.* 310. 1 *Hale*, 464. So, where two soldiers came to a public-house late at night, and required to be served with beer, which the landlord refused on account of the lateness of the hour, and they then went away, uttering imprecations; in about an hour and a half afterwards, as the door was opened to let out some persons who had been detained in the house on business, one of the soldiers rushed in (the other remaining outside) and insisted on being served with beer, which the landlord again refused ; and on the soldier's refusing to depart, and attempting to lay hands on the landlord, the latter collared him, and they pushed and pulled each other to the door, where the other soldier gave the landlord a violent blow on the head with some sharp instrument, of which he died : the soldiers being indicted for murder, Buller, J., held that this was murder in both, there being reasonable evidence that they had returned the second time with a deliberate intention to use personal violence in case beer should be refused to them. *R. v. Willoughby et al.*, 1 *East, P. C.* 288. But where two private watchmen, seeing the prisoner and another man with two carts laden with apples, and suspecting they had stolen them, went up to them, and one walked beside the prisoner, and the other beside the other man, and whilst they were going along, the other man stepped back and wounded the watchman with whom he had been walking with a bludgeon : Upon the prisoner being indicted, as being present aiding and abetting, Garrow, B., told the jury, that to convict the prisoner the jury must be satisfied not merely that he and the other man came out for the common purpose of stealing apples, but that they also entertained

the common guilty purpose of resisting with extreme violence any person who might endeavour to apprehend them ; if the only common purpose they had was that of stealing apples, and the violence of the prisoner's companion was merely the result of the situation in which he found himself, and proceeded from the impulse of the moment, without any previous concert, they must acquit the prisoner. *R. v. Hawkins*, 3 Car. & P. 392. So, where A. and B. were riding violently along a road, and seemingly racing, and A. rode past the horse of C. without doing any damage, but B. in following him rode against C., who was thereby thrown and killed,—this was holden to be manslaughter in B. only, not in A. *R. v. Mastin*, 6 Car. & P. 396. So, where two persons were indicted for cutting one Randall, with intent, &c., it appeared that the two prisoners were found in the area of a house at night, attempting to break in ; one of them leaped out and ran away, but he was seized and secured by a watchman ; the other was seized by Randall, another watchman, as he was running in another direction, but he gave Randall a violent blow on the head, and, during the scuffle that ensued, gave him a very severe cut on the head with the sharp end of an iron crow : the question was, whether the man who first ran away, could be said to be a principal in the second degree to the person who actually gave the blow, although not present at the time ; and the judges held that he could not. *R. v. White et al.*, R. & Ry. 99. And in all cases where there is no such common purpose, a person who is merely present at a murder, but neither takes any part in it, nor endeavours to prevent it, nor apprehends the murderer, nor levies hue and cry after him,—although this strange behaviour is highly criminal, it will not of itself render him either principal or accessory. *Fost.* 350. So, where several persons were engaged in a smuggling transaction, and upon an attempt to oppose their design by one of the King's officers, one of the smugglers fired a gun, and killed one of his accomplices : it was holden that if the gun were discharged at the King's officers in prosecution of the original design, (which was a fact to be found by the jury), it would be murder in them all, although one of the accomplices happened to be killed : but if done intentionally and with deliberation against the accomplice, from anger or some precedent malice in the party firing, it would be murder in him only. *Plummer's case*, Kel. 109.

In cases of poachers, questions of some nicety frequently arise. Where it appeared that upon some gamekeepers attempting to apprehend poachers, the latter drew up in a line, levelled their guns at the keepers, said they would shoot them, and one of them actually fired, and wounded one of the keepers : it was objected that as this was not done in pursuance of the common design of the poachers, but was entirely beside

it, that person alone who fired the shot could be convicted; but Vaughan, B., said it was quite clear from the evidence, that the common purpose of the poachers at the time was to attack the keepers; all pointed their guns at them, and one actually fired; all were therefore equally guilty; if, indeed, any one of them had separated himself from the others, in such a manner as to indicate a wish not to take part in what they were doing, his case would then admit of a very different consideration. *R. v. Edmunds et al.*, 3 Car. & P. 390. So, upon an indictment of three persons for murder, it appeared that some gamekeepers seized two of the prisoners poaching, who after some little struggle stood still, but called to the third prisoner, who then came up, and with a stick shod with iron, beat the keepers on the head, killed one of them, and rescued the two other prisoners: Vaughan, B., held this to be murder in all. *R. v. Whithorne et al.*, 3 Car. & P. 394. And where a gamekeeper and his assistant, after hearing shots fired in a wood belonging to their master, saw the prisoners come in a direction from it, one of whom had a gun; the keeper called to his assistant to take care of the gun, and the assistant therefore went to the man who had the gun, gently took hold of it near the lock, and took off the percussion cap; the keeper then pretending to call out to some other person to come forward, the three other men fell upon the keeper and his assistant, knocked them down and they became insensible; when the keeper came to himself, all the prisoners were passing him, and one of them said, "Dam 'em, we've done 'em both," and having passed on a few yards, one of them returned, and with some instrument he had in his hand, he gave the keeper a violent blow on the leg, which cut through his gaiter and wounded him: it was objected that as only one of them had given the blow on the leg, he alone was guilty: but the judge told the jury, that if they thought the prisoners were acting in concert, all were equally guilty; and the jury found them all guilty. *R. v. Warner et al.*, R. & M. 380. 5 Car. & P. 525. *Ante*, p. 247.

If a man encourage another to kill himself, and be present at the time he does so, he will be principal in the murder. *R. v. Dyson*, R. & Ry. 523. Where a man and woman, who cohabited together, being in extreme poverty, agreed to commit suicide, and they together took a quantity of laudanum, of which the woman died, but the man recovered: the man was holden guilty of the murder of the woman, and convicted. *R. v. Alison*, 9 Car. & P. 418.

There may be cases, however, in which the degree of guilt of principals may be different. If whilst A. and B. are fighting, C. come up, and take part with A., and B. is killed, this would be manslaughter only in C., 1 Hawk. c. 31, ss. 35, 56, murder or manslaughter in A., according as his killing of B.

was of malice prepense or not. But if C. used any unfair advantage, as if he struck with a deadly weapon, whilst B. was unarmed or the like, he would be guilty of murder. *R. v. Langden, R. & Ry.* 228. Or if B. were an officer of justice in the due execution of his duty, both A. and C. would be guilty of murder. 1 *Hawk. c. 31, s. 57.* So, if A. maliciously intending to kill B., take his servants with him, without informing them of his purpose, and he meet B. and fight with him, and A.'s servants seeing their master engaged take part with him, and kill B.,—A. is guilty of murder, but his servants of manslaughter only, 1 *Hawk. c. 31, s. 55.* 1 *Hale*, 449. *R. v. Salisbury et al., Plowd.* 97, unless B. were an officer of justice at the time in the due execution of his duty, in which case it would be murder in the servants also. 1 *Hawk. c. 31, s. 57.* But where A. beat B., a constable, and they were parted; then C., a friend of A., fell upon the constable, and in the struggle killed him, but A. was not engaged in this, after he was parted from B.: *Holt, C. J., and Rokesby, J.,* held that this was murder in C. alone, and A. was acquitted. 1 *East, P. C.* 296. So, if A. and B. on a sudden quarrel, fight, and C., having malice against B. come up and assist A., and B. is killed, this is manslaughter in A., murder in C. 1 *East, P. C.* 350. So if A. a constable have apprehended B., and whilst he is in his custody, C. come up, and in rescuing B. he kill A., this will be murder or manslaughter in C. according to circumstances, and in B. also if he took part in it; but if B. took no part in the attack of C. upon A., he is not guilty of any offence. *Sir Chas. Stanley's case, Kel.* 87. In *Tooley's case (2 Ld. Raym.* 1296) seven of the judges held that the offence of C. in killing the constable, or rather his assistant, as above mentioned, was manslaughter; five were of opinion that it was murder; and Mr. Justice Foster states it as his opinion that it was murder. *Fost.* 312—318. See also *Adey's case, 1 Leach*, 206. 1 *Hawk. c. 31, s. 60, cont.*

As to principals generally, see *ante*, p. 10.

Accessories before the fact.] An accessory before the fact to murder, is one who counsels, incites, moves, procures, hires, or commands another to commit it, but is not himself present aiding or abetting in the commission of it. *Ante*, p. 14. And he may do it through the intervention of a third party. If A. bid his servant hire somebody, no matter whom, to murder B., and furnish him with money for that purpose; and the servant procure C., a person whom A. never saw or heard of to do it: A., who is manifestly the first mover and contriver of the murder, is accessory before the fact; for he who procures a felony to be committed, is a felon: if present, he is a principal; if absent, an accessory before the fact. *Per Foster, J., in the case of MacDaniel et al., Fost.* 125. 121. And

if A. command B. to beat C., and B. beats him so that he dies, B. is guilty of murder as principal, and A. as accessory; for he who in anywise commands or counsels another to commit an unlawful act, is accessory to all that ensues upon it, but is not accessory to anything distinct from it. 4 *Bl. Com.* 37. And if there be some variance between the advice or command and the execution of it, it is immaterial, provided it be the same in substance: as if a person advise a man to kill another in the day, and he kills him in the night, — or to kill him in the fields, and he kills him in the town, — or to poison him, and he stabs or shoots him: — in these cases he is as much an accessory, as if his advice or command had been strictly pursued. 2 *Hawk. c.* 29, *s.* 20. But if the execution vary in substance from the advice or command, — as if a man advise another to kill A., and he kill B. — in this case the party who advised or commanded, cannot be deemed an accessory before the fact to the felony actually committed. *Id. s.* 21.

There can be no accessory before the fact in manslaughter; for that offence, in its nature, cannot be premeditated. 1 *Hale*, 616. 2 *Hawk. c.* 30, *s.* 2. And therefore if A. be indicted for murder, and B. as accessory before the fact, — if A. be found guilty of manslaughter merely, B. must be discharged.

The punishment of accessory before the fact to murder, is death. 9 *G. 4, c.* 31, *s.* 3. See the form of the indictment, *ante*, p. 16.

Accessories after the fact.] There may be accessories after the fact, both in murder and manslaughter. *R. v. Greenacre*, 8 *Car. & P.* 35. As to the law upon the subject, *see ante*, p. 17; and as to the form of the indictment against an accessory after the fact, *see ante*, p. 18.

Accessories after the fact in murder, are punishable with transportation for *life*, — or imprisonment with or without hard labour for not more than *four* years. 9 *G. 4, c.* 31, *s.* 3.

Accessories after the fact in manslaughter, are punishable with imprisonment, with or without hard labour, for not more than *two* years. 9 *G. 4, c.* 31, *s.* 31.

Verdict, &c.] As to the verdict for murder, *see ante*, pp. 173, 174, 175. As to the judgment, *ante*, p. 180, and the form of it, *ante*, p. 193. As to the execution, *ante*, pp. 202, 203. As to costs, *see ante*, 176; and costs of apprehension, *see ante*, p. 189.

2. *Manslaughter.*

Indictment.

— } The jurors for our Lady the Queen, upon their
to wit. } oath present, that A. B., on the — day of —,
in the year of our Lord —, feloniously did kill and slay one

C. D. : against the peace of our Lady the Queen, her crown and dignity.

Transportation for life, or for not less than seven years,—or imprisonment, with or without hard labour, for not more than four years,—or to pay such fine as the court shall award. 9 G. 4, c. 31, s. 9..

As to the form of the indictment, see stat. 14 & 15 Vict. c. 100, s. 4, ante, p. 206; and as to the venue, see ante, p. 68. As to manslaughter abroad or on the high seas, the indictment may readily be framed from the forms, ante, pp. 207, 208. Care should be taken to insert the name of the deceased correctly. See ante, p. 207. Except where the offence is clearly manslaughter, it is usual in practice to indict for murder; and then at the trial if the judge deem it manslaughter only, the jury may give a verdict accordingly.

Evidence.

To support this indictment, the prosecutor must prove—

1. The killing of the deceased by the defendant, and the deceased's name, if known and stated in the indictment,—in the same manner as in murder is directed, *ante*, pp. 208—213.

2. Circumstances showing that the homicide was not justifiable, or excusable, but amounted in law to manslaughter. Manslaughter is the unlawful killing of another, without malice prepense, express or implied. It may be either voluntary, upon a sudden heat or passion, or involuntary, in the commission of some unlawful act. This subject the reader will find treated of at large, under the head "Homicide," *ante*, p. 226, &c.; and it is unnecessary again to notice it in this place. In what cases homicide by accident may be manslaughter, *see ante*, pp. 216—221; in what cases homicide in furtherance of justice may be manslaughter, *see ante*, pp. 221—223; in what cases homicide in self-defence, or *se et sua defendendo*, may be manslaughter, *see ante*, pp. 223—226; in what cases homicide on provocation, or in sudden combat, is manslaughter, not murder, *see ante*, pp. 226—236; in what cases the killing of officers of justice in the execution of their duty,—of gamekeepers by poachers,—and of persons pressing or impressed to the sea service,—is manslaughter only, not murder, *see ante*, pp. 236—249.

3. Administering Poison.

Indictment.

— } The jurors for our Lady the Queen, upon their
to wit. } oath present, that A. B., on the — day of —,
in the year of our Lord —, feloniously did administer to

one C. D., [*“administer to, or cause to be taken by any person”*] a certain poison, [*“any poison or other destructive thing,”*] to wit, two drachms of a certain deadly poison called arsenic, with intent in so doing, feloniously, wilfully, and of his malice aforethought, to kill and murder the said C. D. : against the form of the statute in such case made and provided, and against the peace of our Lady the Queen, her crown and dignity. [*If necessary, add another count, charging that the prisoner “did cause to be taken by the said C. D. a certain poison, to wit,” &c. And if there be any doubt as to the quality of the poison, add other sets of counts, naming it differently ; and add also a set of counts stating it to be “a certain destructive thing to the jurors aforesaid unknown.”*]

Felony, death. 1 Vict. c. 85, s. 2. *Accessories before the fact, the same punishment.* Id. s. 7 ; see ante, pp. 14, 15. *Accessories after the fact, imprisonment, with or without hard labour, for not more than two years.* Id. ss. 7, 8 ; see ante, pp. 17, 18.

Evidence.

To maintain this indictment, the prosecutor must prove—

1. That the prisoner administered the arsenic or other poison or destructive thing mentioned in the indictment. In *R. v. Harley*, 4 Car. & P. 369, it appeared that the prisoner, who was a female servant of the prosecutrix, in preparing the breakfast of her mistress, had put arsenic into the coffee pot, and afterwards told her that she had prepared the coffee for her ; upon which the mistress took the coffee for her breakfast : Parke, J., held that this was an administering of poison, within the meaning of the former statute upon this subject (9 G. 4, c. 31, s. 11). In another case, where the prisoner, after mixing corrosive sublimate with moist sugar, and putting it in a paper parcel, with a written direction on it “to be left at Mrs. Daws, Townhope,” left it on the counter in a tradesman’s shop where she had purchased some salt ; and the tradesman finding it there, but mistaking the direction, sent it to a Mrs. Davis, who used some of it as sugar : Gurney, B., held this to be an administering of the poison, within the meaning of the statute ; if it were intended for Mrs. Daws, and found its way to Mrs. Davis, and she took it, the crime was as much within the Act, as if it had been for Mrs. Davis. *R. v. Lewis*, 6 Car. & P. 161. The propriety of this decision, however, has since been doubted by Parke, B., and Alderson, B., in *R. v. Ryan*, 2 Mo. & R. 213, where the poison being intended for A., was taken by B., and the offence charged was causing the poison to be taken by B. with intent to murder B., which was not the fact ; Parke, B., therefore

ordered a fresh indictment to be preferred, stating the intent to have been "to commit murder," in the words of the statute, without saying of whom, and on that indictment the prisoner was tried and convicted. Upon an indictment on a former statute (43 G. 3, c. 58,) for administering poison to one Elizabeth Davies, it appeared that the prisoner gave Davies a piece of a cake containing the poison, and pressed her to eat it; but, suspecting from circumstances that it contained poison, she merely put it into her mouth, spit it out again, and did not swallow any part of it: it being referred to the judges to consider whether this amounted to an administering of the poison, within the meaning of the statute, it is stated in the case, as reported, that they seemed to think that swallowing the poison was not essential to the completion of the offence; but they held that the mere delivery of it to the woman, was not an administering of it within the meaning of the statute; and a pardon was accordingly recommended. *R. v. Cadman, Ry. & M.* 114. The accuracy of this report, however, so far as respects the reason of the judges for their decision, is doubted; and Parke, J., in *R. v. Harley, supra*, said that the judges, in determining that case, had holden that the poison was not administered within the meaning of the statute, because it had not been taken into the stomach, but only into the mouth. Where it appeared that the prosecutrix had accused the prisoner, her maid servant, of stealing a table cloth; the next morning the prisoner brought a tea pot, and cup and saucer, into her bed room, (she being in the habit of taking her breakfast in bed), and went down stairs; and the prosecutrix then helped herself to some of the tea from the tea pot, which she found to have an acid taste, and on its being analysed, it was found to contain oxalic acid: the jury found that she administered the poison; but they also found that she did not intend to murder, which was of course holden to be equivalent to a verdict of not guilty. *R. v. Draper, 1 Car. & K.* 176. Where upon an indictment for poisoning, it was proved that the prisoner administered two berries of the *coculus indicus* to a child of nine weeks old, with intent to murder it; it was proved that the kernel, which is a strong narcotic poison, is inclosed in a strong shell or pod, very difficult to break, which is innoxious, and that the digestive powers of a child of that age would not break or affect the pod, so as to allow the kernel to act, but that it would either be ejected from the stomach, or pass through such a child without harm; and in fact such was the case,—one berry was thrown up, and the other passed through, without injury to the child: it was objected that under the circumstances, these berries could not be deemed poison, for being in the pods they could not effect any injury to such a child; the prisoner was convicted, and the question being reserved for the opinion of the criminal appeal court,

- the judges held that it was sufficient that these berries were poison, and that they were administered with intent to kill, to bring the case within the statute, and that therefore the conviction was right. *R. v. Cluderoy*, 2 Car. & K. 907. 19 *Law J.*, 119 m.

2. That the prisoner did it, with intent to murder the prosecutor, or (where the offence is laid with intent to murder generally, without saying of whom, as mentioned in Ryan's case, *supra*,) with intent to murder some other person and that the poison was accidentally taken by the prosecutor. This is proved, first, by proving admissions or acts of the prisoner from which the jury may presume the intention (*see ante*, pp. 119, 120), and secondly, by proving the offence to have been committed under such circumstances, that if the prosecutor had died, the offence would have been murder. *See ante*, p. 208, &c. If it be doubtful whether the act charged against the prisoner were done wilfully, or by mistake or accident, it seems that other attempts by him upon the life of the prosecutor, may be given in evidence, to prove that it was done designedly. *See R. v. Voke*, R. & Ry. 531, and *R. v. Dossett*, 2 Car. & K. 306; *ante*, p. 120.

4. *Attempting to administer Poison.*

Indictment.

—) The jurors for our Lady the Queen, upon their to wit. } oath present, that A. B., on the — day of —, in the year of our Lord —, feloniously did attempt to administer to one C. D., a certain poison [*“any poison or other destructive thing”*] to wit, two drachms of a certain deadly poison called arsenic, with intent in so doing then and thereby feloniously, wilfully, and of his malice aforethought, to kill and murder the said C. D.: against the form of the statute in such case made and provided, and against the peace of our lady the Queen, her crown and dignity. [*As to the addition of other counts, when necessary, see note to the last form, ante*, p. 256. *Where the prisoner was indicted for an attempt to poison, by mixing small pieces of sponge with milk, Alderson, J., held the indictment to be bad, because it did not allege that sponge was of a deleterious or poisonous nature. R. v. Powles*, 4 Car. & P. 571.

Felony, transportation for life, or not less than fifteen years,—or imprisonment [with or without hard labour, s. 8] for not more than three years. 1 Vict. c. 85, s. 3. Accessories before the fact punishable in the same manner. Id. s. 7. Accessories after the fact, to be imprisoned [with or without hard labour, s. 8] for not more than two years. Id. s. 7.

Evidence.

To maintain this indictment, the prosecutor must prove—

1. That the prisoner attempted to administer to the prosecutor the arsenic or other poison or destructive thing mentioned in the indictment; and that the attempt was unsuccessful. In *Cadman's case*, ante, p. 257, where the poisoning was holden not to be completed, because the poison was not actually taken into the stomach,—the offence it should seem would be punishable under this clause of the statute, as an attempt to poison. But where A. gave poison to B., with directions to administer it to C.; and B. instead of doing so, handed it over to C., telling him at the same time the instructions he had received from A.: this was holden not to be an attempt to administer the poison by A. *R. v. Williams et al.*, 1 Car. & K. 589.

2. The intent to murder, as in the last case, ante, p. 258. In *R. v. Hanson* (2 Car. & K. 912), where a man gave a woman a quantity of cantharides mixed in rum, which made her very ill and sick, but did not endanger her life, the counsel for the prosecution, seeing that the facts would not sustain an indictment for poisoning or attempting to poison, framed an indictment as for a misdemeanor at common law: but V. Williams, J., after conferring with Cresswell, J., held that it was no misdemeanor at common law; and the prisoner was accordingly acquitted.

It is not necessary to prove that any bodily injury was effected by the attempt. See 1 Vict. c. 58, s. 3.

5. *Stabbing, Cutting, or Wounding, with Intent to Murder.*

Indictment.

— } The jurors for our Lady the Queen, upon their
to wit. } oath present, that A. B., on the — day of
—, in the year of our Lord —, with a certain [knife],
which he the said A. B., in his right hand then had and held,
feloniously did stab, cut, and wound [“*stab, cut, or wound*”]
one C. D., with intent in so doing then and thereby feloniously,
wilfully, and of his malice aforethought, to kill and murder
the said C. D.: against the form of the statute in such case
made and provided, and against the peace of our Lady the
Queen, her crown and dignity. [*Add counts for stabbing,
cutting, and wounding with intent to maim, &c., in the
form*, post, p. 262.]

Felony, death. 1 Vict. c. 85, s. 2. *Accessories before the fact, punishable in the same manner.* Id. s. 7. *Accessories*

after the fact, to be imprisoned [with or without hard labour, s. 8,] for not more than two years. Id. s. 7.

Evidence.

To maintain this indictment, the prosecutor must prove—

1. The stabbing, cutting, or wounding, stated in the indictment. Where the indictment charged a cutting only, and the evidence was of a stabbing only, the judges held that the evidence did not support the indictment. *R. v. M'Dermott, R. & Ry. 356*. I have in the above form, used all the terms in the statute, "stab, and cut, and wound;" there is no objection to it in point of pleading, and in doubtful cases it may be usefully adopted; and if the prosecutor prove any one of them, he will sustain the indictment. Stabbing means a wounding with a pointed instrument; cutting, the making of an incised wound with a cutting instrument. But where the cut was made with an instrument, not originally intended for cutting, nor ordinarily used for such a purpose, and which was not in fact used by the prisoner with intent to cut the prosecutor, but rather with a design to break or lacerate his head, but which was capable of cutting, and did in fact cut his head: the prisoner being convicted, the judges held the conviction to be right. *R. v. Hayward, R. & Ry. 78*. So, where a man struck a woman in the face with the small claw of a hammer, and it cut her, this was holden by the judges to be a cutting, within the meaning of the statute. *R. v. Atkinson, R. & Ry. 104*. But a blow with a square iron bar, which inflicted a contused or lacerated wound merely, was holden not to be a cutting within the Act; *R. v. Adams, 1 Russ. 728*; it is however a wounding within it.

"Wound" is a generic term, including not only incised wounds, but also contused wounds, where the skin is broken, no matter with what instrument or how inflicted. Where it appeared that the prisoner, upon the prosecutor's attempting to apprehend him for some offence, threw a heavy hammer at him, hit him over the eye and nose, breaking the skin on the side of the nose, to the extent of an inch and a half, from which he bled profusely; the blow was given with such force, as to cause the prosecutor to fall senseless from his horse: the judges held this to be a wound within the meaning of a former statute (9 G. 4, c. 31, s. 12,) upon this subject. *R. v. Withers, Ry. & M. 294, 4 Car. & P. 446*. So, where the wound was inflicted with a bludgeon which broke the skin and drew blood, Patteson, J., held it to be a wound within the meaning of the Act. *R. v. Payne et al., 4 Car. & P. 558*. So, where it appeared that the prisoner, in attempting to rob the

prosecutor, threw him down, and kicked him in the face with great violence, cutting the skin of the face near the lip, and breaking it a little near the eye, this was holden to be a wounding. *R. v. Shadbolt*, 5 *Car. & P.* 504. So, where the prisoner struck the prosecutor twice with an air gun, at the side of a thick hat he had on his head, and inflicted a contused wound on his head, not directly with the gun, but with the hat: the prisoner being convicted, the judges held the conviction to be right. *R. v. Sheard*, 7 *Car. & P.* 846. And where the indictment stated that the prisoners, with a stick and with their feet, wounded the prosecutor, and it appeared that one of the prisoners knocked the prosecutor off his horse by a blow on the head with a hedge stake, and the others afterwards kicked him about the head and body with their feet; he was cut on the mouth, and had a severe contused wound on the head, the muscle being divided to the skull: it was contended that a wound given by a foot with a shoe on it, was not within the statute, or, even if it were, it was badly described in this indictment, which stated it to have been done with the feet only; but the judges held, that whether the wounds were inflicted with a stick or a kick from a shoe, in either case the indictment was supported; it was not necessary to state in the indictment the means or instrument by which the wound was inflicted, nor did the statement confine the prosecutor to the means stated, which might be rejected altogether as surplusage. *R. v. Briggs*, *Ry. & M.* 318. A wound however inflicted with the hands or teeth, as by beating with the fists or biting, is not within the Act. *Per Patteson, J.*, in *R. v. Harris*, 7 *Car. & P.* 446. *R. v. Stevens*, *Ry. & M.* 409. But to constitute a wounding, there must be a breaking of the skin; and not merely of the cutis or outer skin, but of the whole skin. *R. v. M'Laughlin*, 8 *Car. & P.* 635. It is immaterial however whether it be an outward or inward wound. *R. v. Smith*, 8 *Car. & P.* 173. *R. v. Waltham*, 13 *Shaw's J. P.* 183. It is immaterial also on what part of the body the wound is inflicted; *per Parke, J.*, in *R. v. Griffith*, 1 *Car. & P.* 298; but if the nature of the wound be one of the circumstances from which the jury are to infer the intent with which the wound was inflicted, it will no doubt be most material to prove that it was inflicted near, or aimed at, a vital part.

Where three men were indicted for cutting and wounding a police constable, it appeared that one of them first attacked him, and the second came and joined him in the attack, and after a while the first ran away; the constable, who had been knocked down, and was then on the ground, was endeavouring to retain his hold of the second man, when the third came up, and kicked him violently several times on various parts of the body: *Tindal, C. J.*, held that as the third man did not come

until the first had got away, he could not be found guilty upon a joint charge with the other two; he was accordingly acquitted and the other two found guilty. *R. v. McPhane et al., Car. & M.* 212. See *ante*, p. 249, as to the principals in the second degree in murder, which is equally applicable to this offence.

2. The intent to murder, as *ante*, p. 258.

As to the verdict: By stat. 14 & 15 Vict. c. 19, which enables a prosecutor to indict as for a misdemeanor any person who shall unlawfully and maliciously cut, stab, or wound him, it is provided by sect. 5, that "If, upon the trial of any indictment for any felony, except murder or manslaughter, where the indictment shall allege that the defendant did cut, stab, or wound any person, the jury shall be satisfied that the defendant is guilty of the cutting, stabbing, or wounding charged in such indictment, but are not satisfied that the defendant is guilty of the felony charged in such indictment,—then and in every such case the jury may acquit the defendant of such felony, and find him guilty of unlawfully cutting, stabbing, or wounding; and thereupon such defendant shall be liable to be punished in the same manner as if he had been convicted upon an indictment for the misdemeanor of cutting, stabbing, or wounding," [that is to say, by imprisonment, with or without hard labour, for not more than three years. *Sect. 4.*]

As to costs, *see ante*, p. 186; and costs of apprehension, *see ante*, p. 189.

6. *Stabbing, Cutting, or Wounding, with Intent to do grievous bodily Harm.*

Indictment.

—— } The jurors for our Lady the Queen, upon their oath to wit. } present, that A. B., on the —— day of ——, in the year of our Lord ——, with a certain [knife] which he the said A. B. in his right hand then had and held, feloniously did stab, cut, and wound ["*stab, cut, or wound*"] one C. D., with intent in so doing then and thereby to *maim* the said C. D.: against the form of the statute in such case made and provided, and against the peace of our Lady the Queen, her crown and dignity. [*Second count.*] And the jurors aforesaid upon their oath aforesaid do further present, that the said A. B., on the day and year aforesaid, with a certain other [knife] which he the said A. B. in his right hand then had and held, feloniously did stab, cut, and wound the said C. D., with intent in so doing then and thereby to *disfigure* the said C. D.: against the form of the statute in such case made and provided, and against the peace of our Lady the Queen, her

crown and dignity. [*Third count.*] And the jurors aforesaid upon their oath aforesaid do further present, that the said A. B., on the day and year aforesaid, with a certain other [knife] which he the said A. B. in his right hand then had and held, feloniously did stab, cut, and wound the said C. D., with intent in so doing then and thereby to *disable* the said C. D.: against the form of the statute in such case made and provided, and against the peace of our Lady the Queen, her crown and dignity. [*Fourth count.*] And the jurors aforesaid upon their oath aforesaid do further present, that the said A. B., on the day and year aforesaid, with a certain other [knife] which he the said A. B., in his right hand then had and held, feloniously did stab, cut, and wound the said C. D., with intent in so doing then and thereby to do some *grievous bodily harm* to the said C. D.: against the form of the statute in such case made and provided, and against the peace of our Lady the Queen, her crown and dignity. [*Fifth count.*] And the jurors aforesaid upon their oath aforesaid do further present, that the said A. B., on the day and year aforesaid, with a certain other [knife] which he the said A. B. in his right hand then had and held, feloniously did stab, cut, and wound the said C. D., with intent in so doing then and thereby to resist and prevent [*"resist or prevent"*] the lawful apprehension [or detainer] of him the said A. B., [or of one E. F.]: against the form of the statute in such case made and provided, and against the peace of our Lady the Queen, her crown and dignity. [*The first four of these counts are those usually joined, in practice; the last is used only when the circumstances of the case require it. In practice these counts usually are joined with, and follow the count for stabbing, &c., with intent to murder, ante, p. 259.*]

Felony, transportation for life, or not less than fifteen years,—or imprisonment for not more than three years. 1 Vict. c. 85, s. 4. *As to costs, see ante, p. 186; costs of apprehension, ante, p. 189. As to verdict, see post, p. 267.*

Evidence.

To maintain this indictment, the prosecutor must prove—

1. The stabbing, cutting, or wounding, as in the last case, *ante*, p. 260.

2. The intent, as laid in the indictment. The previous statute upon this subject, 9 G. 4, c. 31, s. 12, contained a proviso, that if at the trial the act of stabbing, cutting, wounding, shooting, or attempting to shoot, laid in the indictment were committed under such circumstances, that if death had

until the first had got away, he could not be found guilty upon a joint charge with the other two; he was accordingly acquitted and the other two found guilty. *R. v. McPhane et al., Car. & M.* 212. See ante, p. 249, as to the principals in the second degree in murder, which is equally applicable to this offence.

2. The intent to murder, as ante, p. 258.

As to the verdict: By stat. 14 & 15 Vict. c. 19, which enables a prosecutor to indict as for a misdemeanor any person who shall unlawfully and maliciously cut, stab, or wound him, it is provided by sect. 5, that "If, upon the trial of any indictment for any felony, except murder or manslaughter, where the indictment shall allege that the defendant did cut, stab, or wound any person, the jury shall be satisfied that the defendant is guilty of the cutting, stabbing, or wounding charged in such indictment, but are not satisfied that the defendant is guilty of the felony charged in such indictment,—then and in every such case the jury may acquit the defendant of such felony, and find him guilty of unlawfully cutting, stabbing, or wounding; and thereupon such defendant shall be liable to be punished in the same manner as if he had been convicted upon an indictment for the misdemeanor of cutting, stabbing, or wounding," [that is to say, by imprisonment, with or without hard labour, for not more than three years. Sect. 4.]

As to costs, see ante, p. 186; and costs of apprehension, see ante, p. 189.

6. *Stabbing, Cutting, or Wounding, with Intent to do grievous bodily Harm.*

Indictment.

—— } The jurors for our Lady the Queen, upon their oath to wit. } present, that A. B., on the —— day of ——, in the year of our Lord ——, with a certain [knife] which he the said A. B. in his right hand then had and held, feloniously did stab, cut, and wound ["*stab, cut, or wound*"] one C. D., with intent in so doing then and thereby to *maim* the said C. D.: against the form of the statute in such case made and provided, and against the peace of our Lady the Queen, her crown and dignity. [*Second count.*] And the jurors aforesaid upon their oath aforesaid do further present, that the said A. B., on the day and year aforesaid, with a certain other [knife] which he the said A. B. in his right hand then had and held, feloniously did stab, cut, and wound the said C. D., with intent in so doing then and thereby to *disfigure* the said C. D.: against the form of the statute in such case made and provided, and against the peace of our Lady the Queen, her

crown and dignity. [*Third count.*] And the jurors aforesaid upon their oath aforesaid do further present, that the said A. B., on the day and year aforesaid, with a certain other [knife] which he the said A. B. in his right hand then had and held, feloniously did stab, cut, and wound the said C. D., with intent in so doing then and thereby to *disable* the said C. D. : against the form of the statute in such case made and provided, and against the peace of our Lady the Queen, her crown and dignity. [*Fourth count.*] And the jurors aforesaid upon their oath aforesaid do further present, that the said A. B., on the day and year aforesaid, with a certain other [knife] which he the said A. B., in his right hand then had and held, feloniously did stab, cut, and wound the said C. D., with intent in so doing then and thereby to do some *grievous bodily harm* to the said C. D. : against the form of the statute in such case made and provided, and against the peace of our Lady the Queen, her crown and dignity. [*Fifth count.*] And the jurors aforesaid upon their oath aforesaid do further present, that the said A. B., on the day and year aforesaid, with a certain other [knife] which he the said A. B. in his right hand then had and held, feloniously did stab, cut, and wound the said C. D., with intent in so doing then and thereby to resist and prevent [*“resist or prevent”*] the lawful apprehension [*or detainer*] of him the said A. B., [*or of one E. F.*] : against the form of the statute in such case made and provided, and against the peace of our Lady the Queen, her crown and dignity. [*The first four of these counts are those usually joined, in practice ; the last is used only when the circumstances of the case require it. In practice these counts usually are joined with, and follow the count for stabbing, &c., with intent to murder, ante, p. 259.*

Felony, transportation for life, or not less than fifteen years,—or imprisonment for not more than three years. 1 Vict. c. 85, s. 4. As to costs, see ante, p. 186 ; costs of apprehension, ante, p. 189. As to verdict, see post, p. 267.

Evidence.

To maintain this indictment, the prosecutor must prove—

1. The stabbing, cutting, or wounding, as in the last case, *ante*, p. 260.
2. The intent, as laid in the indictment. The previous statute upon this subject, 9 G. 4, c. 31, s. 12, contained a proviso, that if at the trial the act of stabbing, cutting, wounding, shooting, or attempting to shoot, laid in the indictment were committed under such circumstances, that if death had

ensued it would not have amounted to the crime of murder, the defendant should be acquitted. And under that section, a vast number of acquittals took place, and in very bad cases, because the circumstances were such, that if death had ensued, the offences would have been manslaughter only. That proviso, however, has been omitted in the present statute 1 Vict. c. 85, s. 4, on which this indictment is framed; and therefore if the circumstances of the case be such, that if death had ensued it would be only manslaughter, still it is within this Act, if the jury believe that the offence was committed with any of the intents mentioned in the statute and charged in the indictment. *Anon.* 2 *Moody*, 40. *R. v. Griffiths*, 8 *Car. & P.* 248. There is one exception to this, however: where the wound is inflicted "to resist or prevent the lawful apprehension or detainer of any person," where, as the statute requires the apprehension or detainer to be lawful, a wound given in resisting or preventing it, if death had ensued, would be murder. *See ante*, pp. 236, 237.

The intents stated in the statute are,—to maim,—to disfigure,—to disable,—to do some grievous bodily harm,—and to resist or prevent apprehension or detainer of any person.

Mayhem is such an injury to any part of a man's body as may render him less able, in fighting, either to defend himself or to annoy his adversary. 1 *Hawk*, c. 44, s. 1. And therefore the cutting off, disabling, or weakening, a man's hand or finger, or striking out his eye or fore tooth, or emasculating him, are said to be mayhems. *Id.* s. 2. But the cutting off his ear or nose were not holden to be mayhems at common law, because they did not disable or weaken a man, but merely disfigured him. *Id.*

Disfiguring a man, within the meaning of the statute, must, it should seem, be the doing of some external injury to his person, which may detract from his personal appearance, such as the cutting off an ear or nose, as above mentioned.

Disabling means the doing of some injury to the person, by which a permanent disability is created. Therefore where it appeared that the prisoner, upon being detected by a watchman in the act of committing a burglary, struck him two very severe blows with a crowbar and cut him, and then ran away; and the jury found that he cut the watchman with intent to disable him until he could effect his escape: but as the indictment charged the offence to have been committed with intent to murder, to maim, and to disable only, the judges held that the conviction could not be supported; because by the finding of the jury, the prisoner intended to produce a temporary disability merely, and not a permanent one, as intended by the statute. *R. v. Boyce*, *Ry. & M.* 29.

A grievous bodily harm is a generic term and may comprehend severe wounds or hurts of various kinds; but they are

not required to be such as are likely to produce permanent injury. Where a man cut a female child's private parts, for the purpose of enlarging them for a time, but the hymen was not injured, the incision was not deep, and the wound was not eventually dangerous : Graham, B., left it to the jury to say, whether this was not a grievous bodily injury to the child, though eventually not dangerous ; and as to the intent, he said that although it probably was the prisoner's intention to have committed a rape, yet if, to effect that, he did the child a grievous bodily injury, he was not the less guilty of the latter crime, because his principal object was another ; the intention of the prisoner might be inferred from the act : the jury found the prisoner guilty, and the judges held the conviction to be right. *R. v. Cox, R. & Ry.* 362. Where a man, passing along the highway, received a blow from one of two persons which severely wounded him, and he was immediately robbed of money and goods ; upon the prisoner being indicted as one of the two, for the wounding, Coleridge, J., told the jury that if they believed that the prisoner inflicted the wound on the prosecutor, with an intent to rob him, but had at the same time an intent to do him some grievous bodily harm to effectuate his intention of robbing, then in law the prisoner ought to be convicted of the wounding ; it was objected that there was no evidence that the prisoner inflicted the wound, but the judge said that if the prisoner did not with his own hand inflict the wound, yet he might still be convicted, if the jury were satisfied that the prisoner and the other man were jointly engaged in a common purpose of robbing the prosecutor, and that the wound was inflicted by the other man. *R. v. Bowen, Car. & M.* 149. Where the prisoner was indicted for cutting a man named Cambridge on the wrist, with intent to prevent his apprehension, and with intent to do Cambridge some grievous bodily harm : it appeared that the prisoner was seized by Cambridge and one Headley, in the night time, immediately after he had attempted to break open Headley's stable, for the purpose of stealing ; he was taken into the house, and whilst sitting there beside Headley, he got up quietly, took a knife from the table, then returned to his seat, and saying to Headley, " I'll be revenged on you, let the consequence be what it will," he endeavoured to strike him with the knife ; Headley then struggled to get the knife from him, and the prisoner made two attempts to stab him with it, but without success ; the prisoner then rushed forward, and cut Cambridge with the knife on the wrist, Headley still endeavouring to get the knife from him, in which he at length succeeded ; the prisoner said he was very sorry he cut the wrong man, he intended to have cut Headley, and he would be revenged on him some time or other : the wound was not dangerous, and was healed in about a week :—it was admitted

that the evidence did not support the count, which charged the offence to have been committed with intent to prevent the prisoner's apprehension; and the question remaining was, whether it was done with intent to do grievous bodily harm to Cambridge:—it was objected that as the wound was not on a vital part, the prisoner could not be said to have intended grievous bodily harm; but the judge overruled this objection at the trial, holding that it was for the jury to say with what intent the stroke or thrust was made by which the cut was given; and the judges afterwards held that if there be an intent to do grievous bodily harm, it is immaterial whether grievous bodily harm have been actually done or not. *R. v. Hunt, Ry. & M. 93.*

Where the intent laid is, to resist or prevent the lawful apprehension or detainer of any person, it must appear that the apprehension or detainer was lawful. In what cases an offender may lawfully be apprehended without warrant, *see ante*, p. 21, &c.; in what cases with warrant, *ante*, p. 33; and *see ante*, p. 236, &c. In Hunt's case, *supra*, it was objected that as the original offence (an attempt to break into a stable, to steal) was merely an attempt to commit a felony, which is but a misdemeanor, the prisoner was not lawfully in custody, not being in custody under a warrant: but the judges held that the prisoner, being detected in the night time attempting to commit a felony, might be lawfully detained without warrant, until he could be carried before a magistrate. *R. v. Hunt, Ry. & M. 93.* The evidence in Boyce's case, *ante*, p. 264, would have supported a count of this kind; but there was no such count in the indictment. Where upon an indictment for cutting, with intent to prevent the prisoner's apprehension, one of the objections was, that the prosecutor, when he attempted to apprehend the prisoner, did not inform him for what offence he was about to arrest him: but the judges held that as he was seen in the commission of the offence, and taken on fresh pursuit, this was unnecessary. *R. v. Howarth, Ry. & M. 207. S. P. R. v. Fraser, Ry. & M. 419. R. v. Robinson, 2 Stark. Ev. 693 n. See ante*, p. 246. But where the prisoner was indicted for cutting one Walby, to prevent his, the prisoner's, apprehension, and it appeared that a stranger had complained to a constable of the prisoner's having ill-used him (and it did not appear what the ill-usage was), the constable called upon Walby to assist him, and they both took the prisoner into custody; as they were taking him to a magistrate, the prisoner struck Walby in the presence of the constable, and some time afterwards ran away; Walby pursued him, and in attempting to take him, the prisoner gave him a cut with a knife in the face: the judges held that the original arrest was illegal, and that the recaption would have been illegal also, and that the case consequently was not within the statute. *R. v. Curvan, Ry. & M. 132. And see*

R. v. Thompson, Ry. & M. 80. By the former statute (9 G. 4, c. 31, s. 12,) the cutting, &c., must have been to resist or prevent the apprehension or detainer of the party so offending or of any of his accomplices, for an offence for which he might by law be apprehended or detained; but by this Act, 1 Vict. c. 85, s. 4, it is, to resist or prevent the apprehension or detainer of "any person."

As to the proof of the intent, it may be proved by the admissions or acts of the defendant. *See ante*, pp. 119, 120. It may be laid down as a safe rule, that the prisoner may in all cases be charged with having intended that which he has actually effected; as if by cutting the prosecutor he has maimed him, he may be charged with having cut him with intent to maim him. Or if the prisoner's intent be proved *aliunde* from his acts or words, he may be convicted, although he did not effect all he intended. *See R. v. Hunt, ante*, p. 266.

Care must be taken that there is no material variance between the intent laid and that proved. Where the prisoners were charged with cutting the prosecutor, with the several intents to murder, to disable, and to do him some grievous bodily harm, and the jury found that it was done with intent to prevent their apprehension, and for no other purpose: the judges held that as the intents stated were actually negatived by the jury, the defendants could not be convicted. *R. v. Duffin et al., R. & Ry.* 365. *And see R. v. Boyce, ante*, p. 264. But where upon an indictment for shooting a man with intent to do him some grievous bodily harm, the jury found that the prisoner's motive was to prevent his lawful apprehension, but that in order to effect that purpose, he had also the intention of doing the prosecutor some grievous bodily harm: it was objected that as the principal intent was to prevent apprehension, that should have been charged as the intent in the indictment: but the judges held the conviction right; for if both intents existed, it was immaterial which was the principal, which the subordinate one. *R. v. Gillon, Ry. & M.* 85. *And see R. v. Bowen, ante*, p. 265.

But if none of the intents be proved, the jury, by stat. 14 & 15 Vict. c. 19, s. 5, may acquit the defendant of the felony, and find him guilty of a misdemeanor, in cutting, stabbing, or wounding the prosecutor; and he may thereupon be sentenced to imprisonment, with or without hard labour, for not more than three years. *Id.* s. 4. *Vide infra*.

7. Misdemeanor in Stabbing, Cutting, or Wounding.

Indictment.

— } The jurors for our Lady the Queen, upon their
to wit. } oath present, that A. B., on the — day of —,
in the year of our Lord —, unlawfully and maliciously did

cut, stab, and wound ["*cut, stab, or wound*"] one C. D. : against the form of the statute in such case made and provided, and against the peace of our Lady the Queen, her crown and dignity.

Misdemeanor, imprisonment, with or without hard labour, for not more than three years, 14 & 15 Vict. c. 19, s. 4. Costs to be allowed, as in cases of felony. Id. s. 14.

Evidence.

To maintain this indictment, the prosecutor must prove—

1. The cutting, stabbing, or wounding, as *ante*, p. 260.

2. That it was done maliciously; see *ante*, pp. 120, 121. If in proving this, the prosecutor happen to prove a felony, within either of the cases No. 5 or 6, *ante*, pp. 259, 262, the defendant shall not on that account be acquitted; but the court, in its discretion, may discharge the jury, and direct the prisoner to be indicted for the felony. 14 & 15 Vict. c. 100, s. 12.

8. *Inflicting grievous bodily Harm.*

Indictment.

— } The jurors for our Lady the Queen, upon their
to wit. } oath present, that A. B., on the——day of——, in
the year of our Lord——, unlawfully and maliciously did
[assault one C. D., and did then unlawfully and maliciously,
“&c., stating particularly the acts done,”] and thereby then
did unlawfully and maliciously inflict upon the said C. D.
grievous bodily harm: against the form of the statute in such
case made and provided, and against the peace of our Lady
the Queen, her crown and dignity. [*The facts I think must
be set out; for although it is sufficient to state an intent to
do grievous bodily harm, generally, yet when a statute, as in
this case, makes it an offence to inflict grievous bodily harm,
I think it necessary to set out the acts, specially, by which
the bodily harm was inflicted.*]

Misdemeanor, imprisonment, with or without hard labour, for not more than three years. 14 & 15 Vict. c. 19, s. 4. Costs to be allowed, as in cases of felony. Id. s. 14.

Evidence.

To maintain this indictment the prosecutor must prove—

1. The acts done by the defendant, with or without weapon;

Doing bodily Injury, dangerous to Life. 269

14 & 15 Vict. c. 19, s. 4 ; and that they had the effect of producing grievous bodily harm, as mentioned, *ante*, pp. 264, 265.

2. That they were done maliciously ; which must be proved as directed, *ante*, pp. 120, 121. If in proving this, the prosecutor happen to prove a felony, the defendant shall not on that account be acquitted ; but the court, in its discretion, may order the jury to be discharged, and direct the prisoner to be indicted for the felony. 14 & 15 Vict. c. 100, s. 12.

9. *Doing bodily Injury, dangerous to Life.*

Indictment.

— } The jurors for our Lady the Queen, upon their
to wit. } oath present, that A. B., on the — day of —,
in the year of our Lord —, feloniously did [assault one C. D.,
a child of tender age, to wit of the age of — years, and did
then feloniously strike and kick the said C. D., and feloniously
did then knock the head of the said C. D. against a certain
beam, and feloniously did then with great force and violence
cast and throw the said C. D. upon a certain brick floor], and
did thereby then cause unto the said C. D. great bodily injury,
dangerous to the life of the said C. D., to wit [a concussion of
the brain], with intent in so doing then and thereby feloniously,
wilfully, and of his malice aforethought to kill and murder
the said C. D. [*“to commit murder”*]: against the form of
the statute in such case made and provided, and against the
peace of our Lady the Queen, her crown and dignity. [*It has
been holden not to be necessary to state the nature of the
injury dangerous to life, as in the above form ; R. v. Cruse
et ux., 2 Moody, 53, 8 Car. & P. 541 ; but it is better to do so,
where it can be stated with certainty, and proved as stated.*

Felony, death. 1 Vict. c. 85, s. 2. *Accessories before
the fact are punishable in the same manner ; accessories
after the fact, by imprisonment [with or without hard labour,
Id. s. 8,] for not more than two years. Id. s. 7.*

Evidence.

To maintain this indictment, the prosecutor must prove—

1. The acts done by the defendant, as stated in the indictment, and that the injury occasioned by them was such as to be dangerous to life. The words of the statute are,—whoever shall, “by any means whatsoever, cause to any person any bodily injury dangerous to life,” with intent to commit

murder, shall be guilty of felony, and suffer death. So that the acts which caused the injury must, I conceive, be set forth, and proved as laid. And where a man and his wife were indicted for assaulting a child, and causing to it a certain bodily injury dangerous to life, by striking and kicking it, knocking its head against a beam in the ceiling, and then throwing it down upon a brick floor, so as to cause a concussion of the brain—done with an intent to murder: it was holden to be an offence within stat. 1 Vict. c. 85, s. 2, above mentioned. *R. v. Cruse et ux.*, 8 Car. & P. 541. 2 *Moody*, 53. But if all the facts stated in the indictment be not proved, yet if sufficient be proved to amount to an offence within the statute, failing to prove the residue shall not hurt. See *ante*, p. 119.

2. The intent to murder as directed, *ante*, p. 258. It is not sufficient to prove merely that if death had ensued, the offence would have been murder; but admissions or acts of the defendant, from which an intent to murder may reasonably be inferred by the jury, must be proved. *Per Patteson, J.*, in *R. v. Cruse et ux.*, *supra*.

10. *Shooting at a Person with Intent to Murder.*

Indictment.

— } The jurors for our Lady the Queen, upon their
to wit. } oath present, that A. B., on the — day of —,
in the year of our Lord —, a certain [pistol] then loaded
and charged with gunpowder and [one leaden bullet], which
pistol he the said A. B. in his right hand then had and held,
did then feloniously shoot and discharge at and against one
C. D., with intent in so doing then and thereby feloniously,
wilfully, and of his malice aforethought to kill and murder
the said C. D. [*“to commit the crime of murder”*]: against
the form of the statute in such case made and provided, and
against the peace of our Lady the Queen, her crown and dig-
nity. [*If there be any doubt of his intention to kill the
particular person mentioned in the indictment,—if he fired
at that person, mistaking him for another,—then, instead of
the words, “to kill and murder the said C. D.” in the above
form, say, “to commit the crime of murder.”* See *R. v.*
Holt, 7 Car. & P. 518. Counts may be, and usually are,
added, for shooting with intent to maim, disfigure, disable,
or to do some grievous bodily harm, as in the form No. 12,
post, p. 274.

*Felony, transportation for life, or for not less than fifteen
years;—or imprisonment [with or without hard labour,*

Id. s. 8] for not more than three years. 1 Vict. c. 85, s. 3. Accessories before the fact are punishable in the same manner; accessories after the fact, by imprisonment [with or without hard labour, Id. s. 8] for not more than two years. Id. s. 7. As to costs, see ante, p. 186; costs of apprehension, ante, p. 189.

Evidence.

To maintain this indictment, the prosecutor must prove—

1. That the defendant fired the pistol, or gun, as stated in the indictment. Where it appeared that the shot had been fired from the barrel of a percussion gun, which had been separated from the stock and lock, but which the prisoner fired by hitting the percussion cap which was on the nipple of the barrel with something which he took from his pocket: *Patteson, J.*, held this to be a case within the statute; and afterwards, upon consulting with other judges upon the subject, refused to reserve the point for the opinion of the judges. *R. v. Coates, 6 Car. & P. 394.*

2. That he fired at the prosecutor, as stated in the indictment. Where the prisoner fired into a room in which he imagined the prosecutor was at the time, but in fact he was not there, nor within reach of the shot, it was holden that he could not be convicted, however evident his intention might be. *R. v. Lovell, 2 Mo. & R. 39.* So where a man at night fired towards that part of a fence over which he imagined the prosecutor was passing, when in fact the prosecutor passed over another part of the fence at more than five yards distant from it: it was holden, on the old statute on this subject (9 G. 1, c. 22,) not to be a shooting at the prosecutor. *Empson's case, 1 Leach, 247.* But if a man fire at A., and shoot B., he may be indicted for shooting and discharging the pistol or gun against B., for in fact he did so. *R. v. Jarvis, 2 Mo. & R. 40.* However, this third section of stat. 1 Vict. c. 85, must be considered to have reference more particularly to shooting without wounding; for shooting and wounding with intent to murder, is punishable with death, by the second section. See *ante*, p. 259.

3. That at the time it was fired, it was loaded with gunpowder and a bullet, or other destructive matter, as laid in the indictment. Where the indictment alleged that the pistol was loaded with gunpowder and a leaden bullet, and it appeared in evidence that no bullet was found, either in the wound or elsewhere, and the wound was such as might have been inflicted with either the wadding or a bullet: *Bolland, B.*,

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after consulting Park and J. Parke, JJ., held that the evidence did not maintain the indictment. *R. v. Hughes et al.*, 5 Car. & P. 126. But although the ball be not found, yet the jury may judge from circumstances detailed at the trial, whether the pistol was so loaded or not, and find accordingly. At the trial of Oxford, for shooting at the Queen, with a pistol loaded with gunpowder and a bullet, it was proved that the prisoner had fired two pistols at Her Majesty, but the bullets were never found; however it was proved by two witnesses that when he fired the pistols, they were near him, and something whizzed past them; it was proved by others that he had previously purchased balls and percussion caps, and balls and a bullet were found in his box; and he had said to one person, "if your head had come in contact with the ball, you would have found there was a ball in the pistol:" Lord Denman, C.J., after detailing the evidence, told the jury that it was not a matter of law, but a matter of fact for them to judge of from the circumstances, and to satisfy themselves that the pistol was loaded;— (by a jurymen) "with a bullet?" (Ld. Denman) "or a ball;" (Alderson, B.) "not with powder and wadding only." So, where the prisoner, in endeavouring to effect his escape, said to the prosecutor, "let me pass, or I will blow your brains out," and immediately fired, and wounded the prosecutor in his neck and chin; the prosecutor in his evidence, said he thought that the wound must have been given by a ball, from the sensation he felt at the time, and because it took him in one place; and another witness said that the report was very strong for so small a pistol: it was objected that there was not sufficient evidence that the pistol was loaded with a leaden bullet; but the court said that there was evidence to go to the jury, and they accordingly left it to the jury, who found the prisoner guilty. *Weston's case*, 1 Leach, 247.

4. The intent to murder, as *ante*, p. 258; and see *R. v. Harris*, 1 East, P. C. xviii.

11. *Attempting to shoot at a Person, with Intent to Murder.*

Indictment.

— } The jurors for our Lady the Queen, upon their
to wit. } oath present, that A. B., on the — day of —,
in the year of our Lord —, having in both his hands a cer-
tain [gun] then loaded and charged with gunpowder and [one
leaden bullet], did then, by drawing the trigger ["*by drawing
a trigger or in any other manner*"] of the said gun, felo-
niously attempt to discharge the said gun, so loaded and
charged as aforesaid, at one C. D., with intent in so doing then
and thereby feloniously, wilfully, and of his malice aforethought
to kill and murder the said C. D., ["*to commit the crime of*

murder”]: against the form of the statute in such case made and provided, and against the peace of our Lady the Queen, her crown and dignity. [*If there be a doubt whether the defendant did not mistake the person at whom he attempted to shoot, for another, against whom he had malice, then instead of the words “to kill and murder the said. C. D.,” in the above form say, “to commit the crime of murder.”* See *R. v. Holt*, 7 Car. & P. 518. Counts may be, and usually are, added, for attempting to shoot, with intent to maim, disfigure, disable, or do some grievous bodily harm, as in the form, No. 12, post, p. 274.

Felony, transportation for life, or for not less than fifteen years,—or imprisonment [with or without hard labour, sect. 8] for not more than three years. 1 Vict. c. 85, s. 3. Accessories before the fact are punishable in the same manner; accessories after the fact, by imprisonment [with or without hard labour, Id. s. 8] for not more than two years. Id. s. 7. As to costs, see ante, p. 186; costs of apprehension, ante, p. 189.

Evidence.

To maintain this indictment, the prosecutor must prove—

1. That the prisoner presented a gun at him, and attempted to discharge it at him, by drawing the trigger or otherwise, as stated in the indictment; that the gun at the time was in a state to be fired, and that it was loaded in such a manner, that if it had been fired, it was calculated to produce death. If the gun or pistol have the touchhole plugged, so that it cannot be discharged, *R. v. Harris*, 5 Car. & P. 159, or if it be not primed, *R. v. Carr*, *R. & Ry.* 377; and see *R. v. Baker*, 1 Car. & K. 254, or if the priming be so wet or damp that it cannot take fire, *R. v. James*, 1 Car. & K. 530, or if the gun or pistol have a flint lock, but no flint, *R. v. Lewis*, 9 Car. & P. 523; in these and the like cases, the gun and pistol are not deemed loaded arms, within the meaning of the statute; and although the prisoner may have imagined them to be in a fit state for shooting, and sufficiently loaded, and although he level them at the prosecutor, and by drawing the trigger or otherwise attempt to discharge them, he cannot be convicted. So, if they be not loaded in such a manner as to kill, if discharged,—as mentioned in the last case, *ante*, p. 271, the prisoner cannot be convicted. So, the pistol or gun must be levelled at or pointed towards the prosecutor, and the prisoner must have made an attempt, by drawing the trigger or otherwise, to discharge it, in order to convict him. Where the prisoner demanded some title deeds from the prosecutor, and being refused, said, “then you are a dead man,” and imme-

diately unfolded a great coat which he had on his arm, and took from it a blunderbus ; but before he could point it at the prosecutor, a person standing near seized him by the two arms, and he was secured : it was holden that he could not be convicted. *R. v. Lewis*, 9 Car. & P. 523. So, where it appeared that the prisoner took a small pistol from his pocket, and saying to the prosecutor, " I'll settle you," cocked it and pointed the muzzle towards the prosecutor ; but at that moment, a person present rushed towards the prisoner, and caught hold of the barrel and cock of the pistol, and had his hand so placed that the trigger could not go back ; the prisoner, however, had his finger on the trigger and pulled at it, but for the reason just mentioned it did not explode : Parke, J., held that it was not a case within the statute ; the words in the statute are, who-soever " shall by drawing a trigger or in any other manner attempt to discharge any kind of loaded arms at any person ;" here the trigger was not drawn, the prisoner being prevented from drawing it ; and the words, " or in any other manner," mean some manner analagous to drawing a trigger, as in the case of a percussion lock, striking the cap with a hammer, or, in the case of a matchlock, putting a brimstone match to the touchhole, or the like. *R. v. St. George*, 9 Car. & P. 483.

2. The intent to murder, as *ante*, p. 258.

12. *Shooting or Attempting to Shoot, with Intent to do grievous bodily Harm.*

Indictment.

—— } The jurors for our Lady the Queen, upon their
to wit. } oath present, that A. B., on the —— day of ——,
in the year of our Lord ——, a certain [gun] then loaded and
charged with gunpowder and [one leaden bullet], which gun
he the said A. B., in both his hands then had and held, did
then feloniously shoot and discharge at and against one C. D.,
with intent in so doing then and thereby to ~~waim~~ the said
C. D.: against the form of the statute in such case made and
provided, and against the peace of our Lady the Queen, her
crown and dignity. [*Second count.*] And the jurors aforesaid
upon their oath aforesaid do further present, that the said
A. B., on the day and year aforesaid, a certain other gun, then
loaded and charged with gunpowder, and one leaden bullet,
which gun he the said A. B., in both his hands then had and
held, did then feloniously shoot and discharge at and against
the said C. D., with intent in so doing then and thereby to
disfigure the said C. D. : against the form of the statute in such
case made and provided, and against the peace of our Lady

the Queen, her crown and dignity. [*Third count.*] And the jurors aforesaid upon their oath aforesaid do further present, that the said A. B., on the day and year aforesaid, a certain other gun, then loaded and charged with gunpowder and one leaden bullet, which gun he the said A. B., in both his hands then had and held, did then feloniously shoot and discharge at and against the said C. D., with intent in so doing then and thereby to *disable* the said C. D.: against the form of the statute in such case made and provided, and against the peace of our Lady the Queen, her crown and dignity. [*Fourth count.*] And the jurors aforesaid upon their oath aforesaid do further present, that the said A. B., on the day and year aforesaid, a certain other gun, then loaded and charged with gunpowder and one leaden bullet, which gun he the said A. B., in both his hands then had and held, did then feloniously shoot and discharge at and against the said C. D., with intent in so doing then and thereby to do some *grievous bodily harm* to the said C. D.: against the form of the statute in such case made and provided and against the peace of our Lady the Queen, her crown and dignity. [*Fifth count.*] And the jurors aforesaid upon their oath aforesaid do further present, that the said A. B., on the day and year aforesaid, a certain other gun, then loaded and charged with gunpowder and one leaden bullet, which gun he the said A. B., in both his hands then had and held, did then feloniously shoot and discharge at and against the said C. D., with intent in so doing then and thereby to resist and prevent [*"resist or prevent"*] the lawful apprehension [*or detainer*] of him the said A. B. [*or of one E. F.*]: against the form of the statute in such case made and provided, and against the peace of our Lady the Queen, her crown and dignity. [*An indictment for an attempt to shoot, may readily be framed from the above form, and from the form, ante, p. 272.*]

Felony, transportation for life, or for not less than fifteen years,—or imprisonment [with or without hard labour, sect. 8] for not more than three years. 1 Vict. c. 85, s. 4. Accessories before the fact are punishable in the same manner; accessories after the fact, by imprisonment [with or without hard labour, Id. s. 8] for not more than two years. Id. s. 7. As to costs, see ante, p. 186; costs of apprehension ante, p. 189.

Evidence.

To maintain this indictment, the prosecutor must prove—

1. The shooting, as *ante*, p. 271; that is to say, that the prisoner fired, *see ante*, p. 271, that he fired at the prosecutor, *see ante*, p. 271, and that the gun was at the time loaded in

such a manner as was calculated to effect the injury intended. *See ante*, p. 271. We have seen that where the intent is to murder, a loading with gunpowder and wadding merely will not be sufficient; but a gun or pistol so loaded, when fired near to the party, may produce grievous bodily harm, or may disfigure the party, and therefore may be deemed "loaded arms" within this section of the statute, although not likely to produce death. *R. v. Kitchen, R. & Ry.* 95.

2. The intent to maim, &c., as *ante*, p. 264.

13. *Attempting to Drown.*

Indictment.

—) The jurors for our Lady the Queen, upon their
to wit. } oath present, that A. B., on the — day of —,
in the year of our Lord —, feloniously did [take one C. D.
(the said C. D. being then an infant of tender years, to wit, of
the age of — years) into both the hands of her the said
A. B., and did then feloniously cast, throw, and push the said
C. D. into a certain pond there situate, wherein there was a
great quantity of water of great depth, to wit, of the depth of
—, and did then feloniously keep and continue the said
C. D. in the water of the said pond for a long space of time,
to wit, for the space of —, and by so casting, throwing, and
pushing the said C. D., into the said pond, and keeping and
continuing him there as aforesaid, the said A. B., then felo-
niously did attempt to drown the said C. D.], with intent in so
doing then and thereby feloniously, wilfully, and of her malice
aforethought to kill and murder the said C. D. [*"to commit
the crime of murder"*]: against the form of the statute in
such case made and provided, and against the peace of our
Lady the Queen, her crown and dignity.

*Felony, transportation for life, or for not less than fifteen
years,—or imprisonment [with or without hard labour,
sect. 8] for not more than three years. 1 Vict. c. 85, s. 3.
Accessories before the fact, are punishable in the same man-
ner; accessories after the fact, by imprisonment [with or
without hard labour, Id. s. 8] for not more than two years.
Id. s. 7.*

Evidence.

To maintain this indictment, the prosecutor must prove—

1. The attempt to drown, as stated in the indictment.
2. The intent to murder, as *ante*, p. 258.

14. *Attempting to Suffocate.*

Indictment.

— } The jurors for our Lady the Queen, upon their
to wit. } oath present, that A. B., on the — day of —,
in the year of our Lord —, [a certain —, which he the
said A. B., in both his hands then had and held, in and upon
the mouth and nostrils of one C. D., then feloniously did forcibly
put and place, and the same — upon the mouth and
nostrils of the said C. D., then feloniously did forcibly keep for
a long space of time, to wit, for the space of —, for the pur-
pose of preventing the said C. D. from breathing; and did
then by so putting and placing the said —, in and upon the
mouth and nostrils of the said C. D., and keeping the same
there as aforesaid, feloniously attempt to suffocate the said
C. D.], with intent in so doing then and thereby feloniously,
wilfully, and of his malice aforethought, to kill and murder
the said C. D. [*“to commit the crime of murder”*]: against
the form of the statute in such case made and provided, and
against the peace of our Lady the Queen, her crown and
dignity.

*Felony, transportation for life, or for not less than fifteen
years,—or imprisonment [with or without hard labour,
sect. 8] for not more than three years. 1 Vict. c. 85, s. 3.
Accessories before the fact, are punishable in the same man-
ner; accessories after the fact, by imprisonment [with or
without hard labour, 1d. s. 8] for not more than two years.
1d. s. 7.*

Evidence.

To maintain this indictment, the prosecutor must prove—

1. The attempt to suffocate, as stated in the indictment.
2. The intent to murder, as *ante*, p. 258.

15. *Attempting to Strangle.*

Indictment.

— } The jurors for our Lady the Queen, upon their
to wit. } oath present, that A. B., on the — day of —,
in the year of our Lord — [a certain silk handkerchief about
the neck and throat of one C. D., then feloniously did forcibly

278 *Causing grievous bodily Harm by Explosion.*

fix, tye, fasten, twist, and tighten, and did then by so fixing, tying, and fastening the said handkerchief about the neck and throat of the said C. D., as aforesaid, and by twisting and tightening the same as aforesaid, feloniously attempt to strangle the said C. D.], with intent in so doing then and thereby feloniously, wilfully, and of his malice aforethought to kill and murder the said C. D. [*“to commit the crime of murder”*]: against the form of the statute in such case made and provided, and against the peace of our Lady the Queen, her crown and dignity.

Felony, transportation for life, or for not less than fifteen years,—or imprisonment [with or without hard labour, sect. 8] for not more than three years. 1 Vict. c. 85, s. 3. Accessories before the fact, are punishable in the same manner; accessories after the fact, by imprisonment [with or without hard labour, Id. s. 8] for not more than two years. Id. s. 7.

Evidence.

To maintain this indictment, the prosecutor must prove—

1. The attempt to strangle, as stated in the indictment.
2. The intent to murder, as ante, p. 258.

16. *Causing Gunpowder to explode, with Intent to do grievous bodily Harm.*

Indictment.

—) The jurors for our Lady the Queen, upon their
to wit. } oath present, that A. B., on the — day of —,
in the year of our Lord —, unlawfully, maliciously, and
feloniously did cause a certain large quantity, to wit, —
pounds weight of gunpowder [*“gunpowder or other explosive
substance”*] to explode, with intent in so doing then and thereby
to burn one C. D. [*“to burn, maim, disfigure, or disable any
person, or to do some grievous bodily harm to any person”*]:
against the form of the statute in such case made and provided,
and against the peace of our Lady the Queen, her crown and
dignity. [*Add other counts, to maim,—disfigure,—disable,—
and to do some grievous bodily harm,—as in the form, ante,
p. 262.*

Felony, 8 & 9 Vict. c. 25, s. 4; transportation for life, or not less than fifteen years,—or imprisonment [with or without hard labour, Id. s. 11] for not more than three years, Id.

s. 5; and if a male, under eighteen, he may be publicly or privately whipped not more than three times. Id. s. 9. Accessories before the fact, punishable in the same manner; accessories after the fact, by imprisonment [with or without hard labour, Id. s. 11] for not more than two years. Id. s. 10.

This offence is not triable at any sessions of the peace. Id. s. 15.

Evidence.

To maintain this indictment, the prosecutor must prove —

1. That the defendant caused the gunpowder to explode, as mentioned in the indictment.

2. The intent to burn, maim, disfigure, disable, or do some grievous bodily harm to the prosecutor, as *ante*, p. 264. That it did burn him, or maim, &c., is in general sufficient evidence that the defendant intended it. *Ante*, p. 267. But if the intent be otherwise proved by the words or acts of the defendant, it is sufficient, "although no injury be effected." 8 & 9 Vict. c. 25, s. 4.

17. *Sending any explosive Substance to a Person, with Intent to do grievous bodily Harm.*

Indictment.

— } The jurors for our Lady the Queen, upon their
to wit. } oath present, that A. B., on the — day of —,
in the year of our Lord —, unlawfully, maliciously, and
feloniously did send to one C. D. ["send or deliver to, or cause
to be taken or received by, any person"] a certain large quan-
tity of a certain explosive and dangerous substance, to
wit, — of —, ["any explosive substance, or any
other dangerous or noxious thing"], with intent in so doing
then and thereby to burn the said C. D. ["burn, maim, dis-
figure, or disable any person, or to do some grievous bodily
harm to any person"]: against the form of the statute in
such case made and provided, and against the peace of our
Lady the Queen, her crown and dignity. [Add other counts,
to maim,—disfigure,—disable,—and to do some grievous
bodily harm,—as in the form, *ante*, p. 262.

Felony, 8 & 9 Vict. c. 25, s. 4; transportation for life, or not less than fifteen years,—or imprisonment [with or without hard labour, Id. s. 11] for not more than three years, Id. s. 5; and if a male under eighteen, he may be publicly or privately whipped not more than three times. Id. s. 9.

280 *Throwing on a Person Corrosive Fluids.*

Accessories before the fact punishable in the same manner ; accessories after the fact, by imprisonment [with or without hard labour, Id. s. 11] for not more than two years. Id. s. 10.

This offence is not triable at any sessions of the peace. Id. s. 15.

Evidence.

To maintain this indictment, the prosecutor must prove—

1. The sending or delivering of the explosive substance to the prosecutor, or causing it to be taken or received by him, as stated in the indictment. Before this statute, and indeed before stat. 1 Vict. c. 15, s. 5, upon the same subject, a man was indicted on stat. 9 G. 4, c. 31, s. 14, for attempting to discharge loaded arms at another, and the evidence was, that he sent to the prosecutor a tin case, of the size and shape of a cigar case, full of gunpowder, with two fulminating matches on the inside, so placed that they were likely to take fire and explode the gunpowder, by the opening of the box ; and the question was reserved for the judges, whether this box was loaded arms, within the meaning of the statute : the judges held that it was not. *R. v. Mountford, Ry. & M. 441, 7 Car. & P. 242.*

2. The intent to burn, maim, disfigure, disable, or do grievous bodily harm, as *ante*, p. 264. The stat. 1 Vict. c. 85, s. 5, was exactly the same as the statute on which this indictment is framed, except that under the former Act, the sending must not only have been with the intent to burn, &c., but the party must have been actually burnt, disfigured, or maimed by it, or have received grievous bodily harm from it ; but under this statute, sending it with intent, &c., is sufficient, “ although no injury be effected.” 8 & 9 Vict. c. 25, s. 4.

18. *Throwing any corrosive Fluid at or on a Person, with Intent to do grievous bodily Injury.*

Indictment.

—) The jurors for our Lady the Queen, upon their
to wit.) oath present, that A. B., on the — day of —,
in the year of our Lord —, unlawfully, maliciously, and
feloniously did cast and throw at and upon one C. D. [“ cast
or throw at or upon, or otherwise apply to any person”] a
large quantity, to wit, — of a certain corrosive fluid [“ any

corrosive fluid or other destructive or explosive substance”] called [oil of vitriol], with intent in so doing then and thereby to burn the said C. D. [“to burn, maim, disfigure, or disable any person, or to do some grievous bodily harm to any person”]: against the form of the statute in such case made and provided, and against the peace of our Lady the Queen, her crown and dignity. [*Add other counts, to maim,—disfigure,—disable,—and to do some grievous bodily harm,—as in the form, ante, p. 262.*]

Felony, 8 & 9 Vict. c. 25, s. 4; transportation for life, or not less than fifteen years,—or imprisonment [with or without hard labour, Id. s. 11,] for not more than three years, Id. s. 5; and if a male under eighteen, he may be publicly or privately whipped not more than three times. Id. s. 9. Accessories before the fact, are punishable in the same manner, accessories after the fact, by imprisonment [with or without hard labour, Id. s. 11,] for not more than two years. Id. s. 10.

This offence is not triable at any sessions of the peace. Id. s. 15.

Evidence.

To maintain this indictment, the prosecutor must prove—

1. The casting or throwing of the corrosive fluid, or other destructive or explosive substance on the prosecutor, as stated in the indictment. A previous statute, 1 Vict. c. 85, s. 5, made this offence a felony, and in precisely the same words with the present Act, except that the burning, maiming, &c., was not only to be intended, but effected. And upon an indictment on that statute, where it appeared that the defendant, a married woman, being jealous of her husband, poured about a quart of boiling water over his face and into his ears, whilst he was asleep, and then ran off, boasting that she had boiled him in his sleep; the man was grievously injured by it, lost his sight for some time, and permanently lost the hearing of one ear: Rolfe, B., held that the boiling water was a destructive substance within that statute; and the woman being convicted, the judges held the conviction to be right. *R. v. Crawford, 2 Car & K. 129.*

2. The intent to burn, maim, disfigure, disable, or do some grievous bodily harm, as *ante*, p. 264. It is not necessary to prove that any injury was effected. 8 & 9 Vict. c. 25, s. 4.

Formerly, when manufacturers were much dissatisfied at the importation of foreign silks and other articles of female apparel, a custom prevailed of throwing corrosive fluids, such as oil of vitriol and aquafortis, upon such dresses, when met

with in the streets, not with any intent to injure the wearer, but to spoil the dress. This was made felony, by stat. 6 G. 1, c. 23, s. 11 (now repealed by stat. 7 G. 4, c. 64, s. 32); and on that statute it was holden that if the act were done for the purpose of injuring the person and not the clothes of the party, it was not a case within the meaning of it. *R. v. Williams*, 1 *Leach*, 529. Under this Act, the intent on the contrary must be to injure the person, not the dress of the party; but if in injuring the dress the offender also injure the person, or if the necessary consequence would be an injury to the person such as is here mentioned, it is probable it would be deemed an offence within the meaning of the present statute. But if the intent be merely to injure the dress and not the person, and the person be not injured, it is clearly not an offence within this Act, nor is it now punishable criminally by any other statute.

19. *Assault and Battery.*

Indictment.

— } The jurors for our Lady the Queen, upon their
to wit. } oath present, that A. B., on the — day of —,
in the year of our Lord —, in and upon one C. D. did make
an assault, and him the said C. D. did then beat, and other
wrongs to the said C. D. then did: against the peace of our
Lady the Queen, her crown and dignity. [*There is no objec-
tion to charging the defendant, in one count, with assault-
ing two persons, when the whole forms one transaction.*
See ante, p. 96.

Misdemeanor at common law. Fine or imprisonment, or both. See ante, p. 185. As to costs: in all cases where a case of an assault is brought before justices of the peace out of sessions for summary decision, and the justices shall be of opinion that it is a fit subject for prosecution by indictment, and shall thereupon bind the complainant and witnesses in recognizance to prosecute and give evidence at the assizes or sessions of the peace,—the court are authorized to allow the prosecutor and witnesses their costs and expenses, and compensation for trouble and loss of time, in the same manner as in cases of felony. 14 & 15 Vict. c. 55, s. 3.

Evidence.

An assault in its usual and restricted sense, as here intended, and which is usually termed a common assault, means an attempt or offer, with force and violence, to do a corporal hurt to another. In its general sense, it means an attempt to do a

personal injury of any kind, by force, such as an attempt to rob, an attempt to commit a rape, an attempt to have connexion with a girl under ten years of age, or the like,—these are also called assaults.

A common assault, to maintain this indictment, may be, by striking at the prosecutor, with or without a weapon;—or presenting a gun at him, at a distance to which the gun will carry, provided it be so loaded that it can be discharged; *R. v. James*, 1 *Car. & K.* 590; or pointing a pitchfork at him, whilst standing within the reach of it; or holding up one's fist at him; or by any other rash act, done in an angry or threatening manner. 1 *Hawk. c. 62, s. 1.* So, riding towards a man, with intent to do him a corporal injury, so that he was obliged to run away to avoid it, was holden by Lord Tenterden, C. J., to be an assault. *Martin v. Shoppee*, 3 *Car & P.* 373. So, where it was proved that A. advanced in a threatening attitude, with an intention to strike B., so that his blow would immediately have reached B., if he had not been stopped: Tindal, C. J., held that this was an assault in point of law, although it appeared that at the particular moment when A. was stopped, he was not near enough for his blow to take effect. *Stephens v. Myers*, 4 *Car. & P.* 349.

A battery is an injury, however trifling, actually done to the person of another, in an angry, revengeful, rude or insolent manner, as by spitting in his face, or in any way touching him in anger, violently jostling him out of the way, or the like. 1 *Hawk. c. 62, s. 2.*

But it is no battery to lay one's hand gently on another, against whom an officer has a warrant, and to tell the officer this is the man he seeks; 1 *Hawk. c. 62, s. 2*; or to lay one's hand on a man, if it be necessary to do so, in order to serve him with process. *Harrison v. Hodgson*, 10 *B. & C.* 445. Or if a horse, being suddenly frightened, run away with a man, without his fault, and run against and injure another man, this is no assault in the rider, for which even a civil action could be maintained against him. *Gibbon v. Pepper*, 1 *Ld. Raym.* 38, 2 *Salk.* 637.

So, if an officer, having a warrant against a man, who will not suffer himself to be arrested, beat or wound him in an attempt to take him; or if a parent in a reasonable manner chastise his child, or a master his servant, or a schoolmaster his scholar, or a gaoler his prisoner; or if one confine a friend who is insane, and bind or beat him, in such a manner as is proper in his circumstances; or if a man force a sword from one, who threatens to kill another therewith; or if a man gently lay his hand upon another, and thereby stay him from inciting a dog against a third person; or if I beat one (without wounding him or throwing at him a dangerous weapon,) who wrongfully endeavours to dispossess me of my lands or

goods, or the goods of another delivered to me for safe custody, and will not desist upon my laying my hand gently on him and disturbing him; or if a man beat, or (as some say) wound or maim one, who makes an assault upon him, or upon his wife, parent, child or master, especially if it appear that he did all he could to avoid fighting before he gave the wound; or if a man fight with or beat one, who attempts to kill a stranger:—these and the like are not deemed breaches of the peace, 1 *Hawk. c. 62, s. 3*, and the defendant in such cases may justify the battery, by giving the special circumstances in evidence, under the plea of not guilty. *Id. c. 62, s. 3*. But if two men go out to fight with their fists, and they strike one another, they are each of them guilty of an assault, and it is immaterial which of them struck the first blow. *Per Coleridge, J., in R. v. Lewis, 1 Car. & K. 419*. So, where it appeared that the defendant, although he at first struck in his defence, afterwards continued to strike the prosecutor from revenge, after the necessity for it had ceased, he was holden guilty of an assault and battery. *R. v. Driscoll, 1 Car. & M. 214*. Where an excise officer gave a man a search warrant to look at, who refused to deliver it back to him, and a scuffle ensued: on an indictment against the officer for an assault, *Ld. Tenterden, C. J.*, left it to the jury to say, whether the officer had used more force than was necessary to recover possession of the warrant. *R. v. Milton, Mo. & M. 107*. If a man conduct himself in a disorderly manner in a public house, and upon the landlord's requesting him to depart, he refuse to do so, the landlord is justified in laying hands upon him to put him out. *Howell v. Jackson, 6 Car. & P. 723*. *Moriarty v. Brooks, Id. 684*.

20. *Assault and doing bodily Harm.*

Indictment.

— } The jurors for our Lady the Queen, upon their
to wit. } oath present, that A. B., on the — day of —,
in the year of our Lord —, in and upon one C. D. did make
an assault, and him the said C. D. then did beat, [*if it be a
very aggravated assault, you may state it more specially*],
and thereby then occasioned unto the said C. D. great actual
bodily harm; and other wrongs to the said C. D. then did:
against the form of the statute in such case made and pro-
vided, and against the peace of our Lady the Queen, her crown
and dignity.

*Misdemeanor at common law; fine or imprisonment,
or both. And in all cases of assaults "occasioning actual
bodily harm," the court, if they order imprisonment, may*

Assault with Intent to commit a Felony. 285

order the offender to be kept to hard labour during the whole or any part of the time. 14 & 15 Vict. c. 100, s. 29.

Evidence.

To maintain this indictment, the prosecutor must prove—

1. An assault, as in the last case, *ante*, p. 282.
2. The great bodily harm occasioned by it to the prosecutor. If he fail in proving this, still the defendant may be found guilty of a common assault.

21. Assault with Intent to commit a Felony.

Indictment.

— } The jurors for our Lady the Queen upon their
to wit. } oath present, that A. B., on the — day of —,
in the year of our Lord —, in and upon one C. D. did make
an assault, and her the said C. D. did then beat and illtreat,
with intent [*here state the felony intended, as for instance :
with intent* “her the said C. D. then violently and against
her will, feloniously to ravish and carnally know;”] and
other wrongs to the said C. D. then did : against the form of
the statute in such case made and provided, and against the
peace of our Lady the Queen, her crown and dignity. [*You
may add a count for a common assault, as ante, p. 282.*

*Misdemeanor ; imprisonment with or without hard labour,
for not more than two years ; and the court may also fine
the offender, and require him to find sureties for keeping the
peace. 9 G. 4, c. 31, s. 25.*

Evidence.

To maintain this indictment, the prosecutor must give the same evidence as if he had indicted the defendant for the felony,—some act however not being done, which was necessary to complete the felony. And the felony so described and proved, must be an offence against the person of the prosecutor. Where a girl was delivered of a child, and A. and B., pretending to her that the child was to be taken to a public institution to be nursed, put the child into a bag, hung the bag with the child in it on some park palings at the side of a foot path, and there left it : A. and B. being indicted for an assault with intent to murder, and with a count for a common assault. Tindal, C. J., told the jury that it hardly could be inferred that A. or

286 *Assault on Account of preserving Wreck.*

B. intended murder, for if they did, a very little difference in packing up the bag would have effected it; the jury therefore found them guilty of the common assault. *R. v. March et al.*, 1 Car. & K. 498.

If the evidence, however, should prove the felony actually completed, still the jury may find the prisoner guilty of the attempt only, as laid in the indictment,—unless the judge, in his discretion, discharge the jury from giving a verdict on this indictment, and order the defendant to be indicted for the felony. 14 & 15 Vict. c. 100, s. 12. If, on the other hand, you prove the assault, but fail in proving the intent, the jury may convict the defendant on the second count, for a common assault.

22. *Assaulting a Justice of the Peace, &c., on Account of his preserving Wreck.*

Indictment.

— } The jurors for our Lady the Queen, upon their
to wit. } oath present, that at the time of the committing of
the offence hereinafter mentioned, to wit, on the — day of
—, in the year of our Lord —, one C. D., then being one of
Her Majesty's justices of the peace in and for the county of —,
[“*magistrate, officer, or other person lawfully authorized,*”]
was then engaged in the lawful exercise of his duty as such
justice in and concerning the preservation of a certain ship
and vessel then wrecked, stranded, and cast on shore [“*any
vessel in distress,*” or “*any vessel, goods or effects, wrecked,
stranded, or cast on shore, or lying under water*”], being
then thereunto lawfully authorized; and that A. B., then,
well knowing the premises, in and upon the said C. D., so
being in the lawful exercise of his said duty as aforesaid, did
unlawfully make an assault, and him, the said C. D. did then
strike and beat [“*strike or wound*”] on account of the exercise
of his the said C. D.'s said duty as such justice as aforesaid in
and concerning the preservation of the said ship and vessel so
wrecked, stranded, and cast ashore as aforesaid: against the
form of the statute in such case made and provided, and
against the peace of our Lady the Queen, her crown and
dignity.

Misdemeanor; transportation for seven years;—or imprisonment, with or without hard labour, for such term as the court shall award. 9 G. 4, c. 31, s. 24.

Evidence.

Justices, constables, &c., and persons called by them to their aid, in case of a shipwreck within their jurisdiction, have

certain duties assigned to them by stat. 12 Ann, st. 2, c. 18, s. 1; and assaulting and striking or wounding them on account of their being so engaged, is punishable with transportation or imprisonment, by stat. 9 G. 4, c. 31, s. 24, as above mentioned. To maintain this indictment, the prosecutor must prove—

1. That on the day in question he was a justice of the peace of the county, &c.; it is not necessary to produce the commission, it is sufficient to prove that he then acted and usually acts as such.

2. That there was then a vessel in distress,—or a vessel, goods or effects, wrecked, stranded, or cast on shore, or lying under water—as stated in the indictment; and that he was engaged in his duty as magistrate, in endeavouring to preserve them.

3. That the defendant struck him, as stated in the indictment.

4. And that the defendant did so, on account of the prosecutor's so exercising his duty in endeavouring to preserve the ship or goods. This of course can only be proved from the defendant's words or acts, or from other circumstances from which the jury may fairly infer it.

23. Assaulting Peace Officers or Revenue Officers.

Indictment.

— } The jurors for our Lady the Queen, upon their
to wit. } oath present, that A. B., on the — day of —,
in the year of our Lord —, in and upon one C. D., (the
said C. D. being then a peace officer, to wit, a constable, and
in the due execution of his duty as such constable then being,"
or "the said C. D. being then a revenue officer, to wit, an
excise officer, and in the due execution of his duty as such
excise officer then being," or "the said C. D. then acting in
aid of one E. F., a peace or revenue officer, to wit, a — in
the due execution of his duty as such — then being) did
make an assault, and him the said C. D., so being in the
execution of his said duty, then did beat and illtreat; and
other wrongs to the said C. D. then did: against the form of
the statute in such case made and provided, and against the
peace of our Lady the Queen, her crown and dignity. [*Add
a count for a common assault, as ante, p. 282.*]

Misdemeanor ; imprisonment, with or without hard labour, for not more than two years, and the court may also fine the offender, and require him to find sureties for keeping the peace. 9 G. 4, c. 31, s. 25. As to costs in cases of assault upon a peace officer, see ante, p. 187.

As to assaulting officers engaged in the preventing of smuggling, see stat. 8 & 9 Vict. c. 87, s. 66, post, tit. "Smuggling."

Evidence.

To maintain this indictment, the prosecutor must prove—

1. That at the time of the assault, he was a peace or revenue officer, as stated in the indictment, and was engaged in his duty as such. Or if the indictment be for an assault of one acting in aid of such officer, then he must prove that the person whom he was assisting upon the occasion, was an officer, or acting as such, and in the exercise of his duty, and that he, the prosecutor was acting in his aid. It is not necessary to produce or prove the officer's appointment. *See ante*, p. 125.

2. That the defendant assaulted him, whilst thus in the execution of his duty. If the prosecutor fail to prove that he was acting at the time in the execution of his duty, the defendant may be convicted on the second count, as for a common assault.

24. Assaulting Gamekeepers.

Indictment.

— } The jurors for our Lady the Queen, upon their
to wit. } oath present, that at the time of the committing
of the assault hereinafter mentioned, to wit, on the — day
of —, in the year of our Lord —, in the night time, to
wit, at eleven of the clock in the night of the said day, A. B.
was found by one E. F., upon certain [inclosed] land of [or in
the occupation of] one C. D., situate at —, then and by
night as aforesaid, unlawfully taking and destroying game [or
armed with a gun, "*gun, net, engine or other instrument*,"
for the purpose of then and by night as aforesaid, unlawfully
taking and destroying game], the said E. F. being then the game-
keeper ["*gamekeeper or servant*"] of the said C. D., and
having then lawful authority to seize and apprehend the said
A. B.; [*And that the said A. B., then escaped from the said
land into a certain other close there situate, and the said E. F.
thereupon pursued him into the said last mentioned close,
for the purpose of so seizing and apprehending him*]; and

that the said E. F. being then about to seize and apprehend the said A. B., for the offence aforesaid, having then lawful authority so to do as aforesaid, he the said A. B., with the gun aforesaid [*“gun, cross-bow, fire-arms, bludgeon, stick, club, or any other offensive weapon whatsoever”*], which he the said A. B., in both his hands then had and held, did then assault and beat, and offer violence towards the said E. F. [*“assault or offer violence”*]: against the form of the statute in such case made and provided, and against the peace of our Lady the Queen, her crown and dignity. [*This count may be joined with one on the 9th section of stat. 9 G. 4, c. 69, against three or more for night poaching. R. v. Finacane et al., 5 Car. & P. 551. The words in the above form between the asterisks **, must be omitted, when not necessary.*]

Misdemeanor; transportation for seven years;—or imprisonment and hard labour for not more than two years. 9 G. 4, c. 69, s. 2.

Evidence.

To maintain this indictment, the prosecutor must prove—

1. That the defendant was found, in the night time, upon certain land, open or inclosed, of or in the occupation of C. D., situate as described in the indictment, and that he was then taking or destroying game or rabbits, or was armed with a gun, &c., for the purpose of taking or destroying them, as stated. The reader will find the 1st and 9th sections of stat. 9 G. 4, c. 69, *ante*, p. 245, which very fully define the offence of night poaching, and the second section, which shows in what cases the owner or occupier of the close, or his gamekeeper or servant and his assistants, may seize and apprehend the poachers. The evidence must be such as to bring the case clearly within these sections.

2. That the prisoner escaped from that land into another place, and that he was pursued and overtaken by the prosecutor,—if such be the fact and it be stated in the indictment.

3. That the prosecutor on the night in question, was the gamekeeper or servant of the owner or occupier of the land, in which the prisoner was found, or one of his assistants.

4. The assault as stated; and that the prosecutor, or some of the persons acting with him, were at the time about to seize and apprehend the prisoner or some of his companions who were found poaching, as above mentioned.

25. Assault to prevent Apprehension.

Indictment.

— } The jurors for our Lady the Queen, upon their
to wit. } oath present, that A. B., on the — day of —,
in the year of our Lord —, in and upon one C. D. did
make an assault, and him the said C. D. did then beat and
ill-treat, with intent in so doing then and thereby to resist and
prevent [*“resist or prevent”*] the lawful apprehension [*“ap-
prehension or detainer”*] of him the said A. B., and of one
E. F., for a certain offence for which they the said A. B. and
E. F. respectively were then liable to be apprehended [*“ap-
prehended or detained”*] by the said C. D., that is to say, for
[*here state the offence generally*]: against the form of the
statute in such case made and provided, and against the
peace of our Lady the Queen, her crown and dignity. [*Add
a count for a common assault, as ante, p. 282.*]

*Misdemeanor ; imprisonment, with or without hard
labour, for not more than two years ; and the court may
also fine the offender, and require him to find sureties for
keeping the peace. 9 G. 4, c. 31, s. 25. See also stat. 14 &
15 Vict. c. 19, s. 12, as to assaults upon persons authorized
to apprehend offenders under that Act.*

Evidence.

To maintain this indictment, the prosecutor must prove—

1. That he was about to apprehend the prisoner, or that he
had him in custody and was detaining him, as stated in the
indictment; and he must show for what offence and under
what circumstances he was apprehending or detaining him,
in order that it may appear that he was legally justified in
doing so. In what cases an offender may be apprehended
without warrant, *see ante*, p. 21 ; in what cases with warrant,
ante, p. 30.

2. The assault as stated ; and that it was for the purpose of
resisting or preventing such apprehension or detention. If
you fail in proving this, still the defendant may be convicted
on the second count, for the common assault.

26. Assaulting Apprentices or Servants.

Indictment.

— } The jurors for our Lady the Queen, upon their
to wit. } oath present, that A. B., on the — day of —,
in the year of our Lord —, in and upon one C. D., his ap-

prentice ["*apprentice or servant*"] unlawfully and maliciously did make an assault, and him the said C. D. did then beat and ill-treat, whereby the life of the said C. D. was then endangered: against the form of the statute in such case made and provided, and against the peace of our Lady the Queen, her crown and dignity. [*Add if necessary another count, stating the assault and battery as above, "whereby the health of the said C. D. then was [or is likely to be] permanently injured."*]

Misdemeanor; imprisonment with or without hard labour, for not more than three years. 14 Vict. c. 11, s. 1. Costs of prosecution as allowed in certain misdemeanors by stat. 7 G. 4, c. 64. Id. s. 2. See ante, p. 187. Guardians of the union, or guardians or overseers of the parish, may be bound over to prosecute. Id. s. 6.

Evidence.

To maintain this indictment, the prosecutor must prove—

1. The apprenticeship or service. In the case of an apprentice, it may be advisable to give the defendant notice to produce the original indenture, if the prosecutor have not a counterpart, or if there be no admission of the apprenticeship on the part of the defendant. *See R. v. Crompton, Car. & M. 597.*

2. The assault, and its effect, as stated in the indictment; and a medical witness may be necessary, to prove that the life of the prosecutor was endangered by it, or his health permanently injured or likely to be injured by it, as stated.

3. That the assault was unlawful and malicious. This may be proved, by proving that it was committed without cause; or that the correction exceeded greatly the bounds of due moderation, either in the measure of it, or in the instrument with which it was inflicted; *see ante*, p. 218; and in general it may be fairly presumed from the nature of the assault and its results, for the defendant will be presumed to have intended that which he actually effected.

27. Not Providing Apprentices or Servants with necessary Food, &c.

Indictment.

— } The jurors for our Lady the Queen, upon their
to wit. } oath present, that A. B., on the — day of —,
in the year of our Lord —, being the master of one C. D.,

his apprentice [*"apprentice or servant"*], and then legally liable to provide for the said C. D., as his apprentice as aforesaid, necessary food and clothing [*"food, clothing, or lodging"*] did then wilfully and without lawful excuse refuse and neglect [*"refuse or neglect"*] to provide the same for him the said C. D. ; *whereby the life of the said C. D. was endangered [or whereby the health of the said C. D. then was, or is likely to be—permanently injured*]: against the form of the statute in such case made and provided, and against the peace of our Lady the Queen, her crown and dignity. [*It is very doubtful, from the manner in which the stat. 14 Vict. c. 11, s. 1, is drawn, whether the words here between the asterisks * * are necessary. The section defines two offences—"Where the master or mistress of any person shall be legally liable to provide for such person, as an apprentice or as a servant, necessary food, clothing, or lodging, and shall wilfully and without lawful excuse refuse or neglect to provide the same, or where the master or mistress of any such person shall unlawfully and maliciously assault such person, whereby the life of such person shall be endangered or the health of such person shall have been or shall be likely to be permanently injured, such master or mistress shall be guilty of a misdemeanor," &c. And the doubt is, whether the latter clause, "whereby the life," &c., overrides the statement of both offences, and applies as well to the not providing of food, &c., as to the assault. According to the ordinary construction of Acts of parliament, this latter clause would not apply to both, but to the assault only. Yet in all such cases at common law, before this statute, it was actually necessary to state the injury the apprentice or servant sustained by the deprivation of necessary food, &c., otherwise it would be no offence. We must wait, however, for some decision upon the subject; in the meantime I have included the words in this indictment, for if they really do not form any part of the definition of the offence, they may be rejected as surplusage, and need not be proved. See ante, pp. 86. 119.*

Misdemeanor; imprisonment, with or without hard labour, for not more than three years. 14 Vict. c. 11, s. 1. Costs of prosecution, as allowed in certain misdemeanors by stat. 7 G. 4, c. 64. Id. s. 2. See ante, p. 187. Guardians of the union, or guardians or overseers of the parish, may be bound over to prosecute. Id. s. 6.

Evidence.

To maintain this indictment, the prosecutor must prove—

1. The apprenticeship or service, as in the last case; from which will be inferred the legal liability of the defendant to

provide the prosecutor with all necessary food, clothing, or lodging.

2. The refusal or neglect of the defendant to provide the prosecutor with the same, as stated in the indictment.

3. That the prosecutor's life was thereby endangered by it, or his health permanently injured, or likely to be injured, by it, if it be decided that this forms any part of the definition of the offence. *Vide supra, the note at the end of the above indictment.*

28. *False Imprisonment.*

Indictment.

— } The jurors for our Lady the Queen, upon their
to wit. } oath present, that A. B., on the — day of —,
in the year of our Lord —, in and upon one C. D. unlaw-
fully did make an assault, and him the said C. D. did then
unlawfully and injuriously, and against the will of the said
C. D., and without any legal warrant or authority, or any rea-
sonable or justifiable cause whatsoever, imprison the said
C. D.; against the peace of our Lady the Queen, her crown
and dignity.

Misdemeanor at common law; fine, imprisonment, or both.

Evidence.

To maintain this indictment, the prosecutor must prove—

The imprisonment. The slightest detention of a party, or restraint of his personal liberty, against his will, is an imprisonment; and if that be done without lawful authority, it is technically termed false imprisonment. False imprisonment is therefore a mixed question of law and fact: whether there was a detention of the party, against his will, amounting to an imprisonment, is a question of fact; *see Cant v. Parsons*, 6 Car. & P. 504; and whether the authority under which it was effected, was lawful, or was such as did not justify the officer or gaoler, &c., in the detention, is a question of law, depending upon the circumstances of each particular case.

But all the prosecutor has to prove is the imprisonment; for that is presumed to be unlawful, until the contrary is shown. It is for the defendant to justify it, by proving that it was lawful, as an arrest without warrant, *see ante*, p. 21. 1 Arch. N. P. 512, 513, or an arrest under warrant, *see ante*, p. 30. 1 Arch. N. P. 510; or as an arrest under civil process, *see* 1 Arch. N. P. 507.

Indictments for false imprisonment seldom occur in practice; it not being one of those misdemeanors in which the costs of the prosecutors and witnesses are allowed, the injured party usually prefers the civil remedy. See 1 Arch. N. P. 504.

29. Setting Spring Guns, &c.

Indictment.

—) The jurors for our Lady the Queen, upon their
to wit.) oath present, that A. B., on the — day of —,
in the year of our Lord —, did set and place [*“set or place
or cause to be set or placed”*] a certain spring gun [*“spring
gun, mantrap, or other engine calculated to destroy human
life, or inflict grievous bodily harm”*] with intent that the
same should destroy or inflict grievous bodily harm upon a
trespasser or other person who should come in contact there-
with: against the form of the statute in such case made and
provided, and against the peace of our Lady the Queen, her
crown and dignity. [*The statute makes it a misdemeanor to
set spring guns, &c., with intent “or whereby” the same
may destroy, &c. If a man actually receive bodily harm
from it, it does not seem to be necessary to add another count
stating it; but the fact of bodily harm being inflicted, will
be evidence of the gun, &c., having been set with that intent.*

*Misdemeanor. 7 & 8 G. 4, c. 18, s. 1. Fine or imprison-
ment, or both.*

Evidence.

To maintain this indictment, the prosecutor must prove—

1. The setting of the spring gun, mantrap, or other engine, as mentioned in the indictment; and that it was set by the defendant, or by his directions or orders,—or if set by any other person, that the defendant continued it on his premises after he came into possession of them. 7 & 8 G. 4, c. 18, s. 3. The statute, however, does not prohibit the setting of spring guns, mantraps, &c., in a dwelling-house, from sunset to sunrise, for the protection thereof. *Id.* s. 4. Nor does it extend to the setting of any gun, or trap, such as is usually set for destroying vermin. *Id.* s. 2.

2. That the gun was so loaded and set, or the mantrap, &c., so set, as to be capable of destroying, or of inflicting grievous bodily harm. See *ante*, p. 266.

8. The intent to do grievous bodily harm. This may reasonably be implied from the nature of the instrument, the manner in which it was set, or from its having actually inflicted grievous bodily harm upon the prosecutor.

30. *Administering Drugs, &c., to procure Abortion.*

Indictment.

— } The jurors for our Lady the Queen upon their
to wit. } oath present, that A. B., on the — day of —,
in the year of our Lord —, unlawfully and feloniously did
administer to [or did cause to be taken by] a certain woman
called C. D., a large quantity, to wit, — of a certain noxious
thing [“*poison or other noxious thing*”] called —, with
intent then and thereby to cause the miscarriage of the said
C. D. : against the form of the statute in such case made and
provided, and against the peace of our Lady the Queen, her
crown and dignity. [Add a second count, stating it to be “a
certain noxious thing to the jurors unknown.”]

*Felony ; transportation for life, or not less than fifteen
years ; or imprisonment [with or without hard labour, sect. 8]
for not more than three years. 1 Vict. c. 85, s. 6. Acces-
sories before the fact, are punishable in the same manner ;
accessories after the fact, by imprisonment [with or without
hard labour, Id. s. 8] for not more than two years. Id. s. 7.*

*As to costs, see ante, p. 186 ; costs of apprehension, see
ante, p. 189.*

Evidence.

To maintain this indictment, it is necessary to prove—

1. That the defendant administered to the woman, C. D., the poison or other noxious thing mentioned in the indictment. In Cadman's case already noticed, *ante*, p. 257, which was a case of administering poison to a woman with intent to murder, it was holden that the poison could not be considered as administered, unless it were actually taken into the stomach ; and as it there appeared that although the prisoner gave her the poison, and pressed her to take it, yet she merely put it into her mouth, and, suspecting it to be poison, spit it out again, —it was holden not to be an administering of poison within the statute on which the indictment in that case was framed, and it is probable that the same construction would be given to this statute. But if a person give savin or other noxious thing to a woman, to procure her miscarriage, and she then take and swallow it, it will be an administering of it, within the meaning of this indictment ; or if she swallow it afterwards,

even in the prisoner's absence, it should seem that it would satisfy the words "did cause to be taken" &c., in the above form. If it be proved that the poison or noxious thing was given to the woman, but the prosecutor fail in proving that she took it, the defendant, it should seem, may be convicted of an attempt to commit the offence, within stat. 14 & 15 Vict. c. 100, s. 9, *ante*, p 124.

2. That the thing administered, was the poison or noxious thing named in the indictment, which may be proved by the prisoner's admissions, or otherwise. Or if the indictment state it to be a certain noxious thing to the jurors aforesaid unknown, it may be proved to be noxious from its effects, or from the intent with which it was given. Where it was called in the indictment "a decoction of a certain shrub called savin," (which is produced by boiling the leaves), and the evidence was of an "infusion" (which is produced by pouring boiling water on the leaves of the shrub), Lawrence, J., held the variance to be immaterial, as they were *ejusdem generis*. *R. v. Phillips*, 3 Camp. 74.

3. The intent to procure the miscarriage of C. D. This may be proved from the admissions or acts of the prisoner, or from the effects of the medicine. *See ante*, pp. 119, 120. If the intent existed, it is little matter whether the drug had the intended effect, or even whether the woman at the time was with child; *R. v. Goodchild*, 2 Car. & K. 293; for the administering the drug or other thing with the intent stated, is the offence charged. If it also have the effect of killing the mother,—or if the child be born alive, but die by reason of its premature birth,—we have seen that the offence would amount to murder. *Ante*, p. 221.

31. Using Instruments to procure Abortion.

Indictment.

— } The jurors for our Lady the Queen, upon their
to wit. } oath present, that A. B., on the — day of —,
in the year of our Lord —, unlawfully and feloniously did
use a certain instrument called a —, by then [*stating how
it was used; the words in the statute are, "any instrument
or other means whatsoever;" if by other means state them.*
See R. v. West, 2 Car. & K. 784]; with intent then and
thereby to cause the miscarriage of the said C. D.: against the
form of the statute in such case made and provided, and
against the peace of our Lady the Queen, her crown and
dignity. [*Add another count, stating it to be "a certain*

instrument to the jurors aforesaid unknown." The name of the woman will be stated, in stating the manner in which the instrument was used, and referred to afterwards as the "said C. D."

Felony; transportation for life, or not less than fifteen years;—or imprisonment [with or without hard labour, sect. 8], for not more than three years. 1 Vict. c. 85, s. 6. Accessories before the fact are punishable in the same manner; accessories after the fact, by imprisonment [with or without hard labour, Id. s. 8], for not more than two years. Id. s. 7.

Evidence.

To prove this indictment, it is necessary to prove—

1. The instrument, if described, and the use made of it by the prisoner, as mentioned in the indictment.
2. The intent with which it was used, as in the last case.

32. *Concealing the Birth of a Child.*

Indictment.

— } The jurors for our Lady the Queen, upon their
to wit. } oath present, that A. B., on the — day of —,
in the year of our Lord —, being then big with a [male]
child, was then delivered of the said child alive, and which
said child then instantly died; and that after the said child
had so died as aforesaid, to wit, on the day and year aforesaid,
the said A. B. did endeavour to conceal the birth thereof, by
secretly burying [*"secret burying or otherwise disposing of"*]
the dead body of the said child: against the form of the
statute in such case made and provided, and against the peace
of our Lady the Queen, her crown and dignity. (*Second
count.*) And the jurors aforesaid upon their oath aforesaid do
further present that the said A. B., on the day and year afore-
said, being then big with a [male] child, was then delivered of
the said last-mentioned male child, which said last-mentioned
child was, at the time the said A. B. was so delivered of him,
dead, and that the said A. B. did then endeavour to conceal
the birth of the said last-mentioned child, by secretly burying
the dead body of the same: against the form of the statute in
such case made and provided, and against the peace of our
Lady the Queen, her crown and dignity. [*If the concealment
be by other means than secret burying, state them specially.*]

*Misdemeanor; imprisonment, with or without hard labour,
for not more than two years. 9 G. 4, c. 31, s. 14. If the*

mother be tried for the murder of her child and acquitted, the jury may find her guilty of concealing its birth, and then sentence may be passed, as if she had been convicted on the above indictment. Id. And the same, if the grand jury throw out the bill for murder, and the mother be tried on the coroner's inquisition, and acquitted. R. v. Mayward, R. & Ry. 240.

Evidence.

To maintain this indictment, it is necessary to prove—

1. That the prisoner was delivered of a child. It is immaterial whether it was born dead, or died afterwards; in one count here it is stated to have been born alive and that it died afterwards, and in the other that it was born dead,—but this is done merely for the convenience of showing that the child was dead at the time of the burying or other disposal of the body.

2. That she endeavoured to conceal the birth, by secret burying or other disposal of the dead body. And if she have done it by an agent, it is just the same as if she did it herself; and she and the agent are both guilty. *R. v. Douglas & Hall, 7 Car. & P. 644.* And where it has been objected, on the authority of Peat's case, 1 *East, P. C. 229*, that as the birth was known to a second person, there could be no concealment, the judges have overruled the objection wherever such second person appeared to be an accomplice in the concealment. Where a woman who was delivered of a seven months' child, threw it down a privy, and it appeared that another woman, charged as an accomplice with her, must have known of the birth, although she denied it,—the two women being indicted for the murder of the child, the jury acquitted them, but found the mother guilty of endeavouring to conceal the birth: the judge, however, doubting, as a second person knew of the birth, whether the case was within the statute, reserved the point for the opinion of the judges; and they were unanimously of opinion that the act of throwing the child down the privy, was evidence of an endeavour to conceal the birth of the child, and that the conviction was right. *R. v. Cornwall, R. & Ry. 336.* So, where a woman, being delivered of a child, which died soon after birth, concurred with her paramour in endeavouring to conceal the birth, and by her persuasion (she remaining in bed) he took the body, and buried it in a field, intending to conceal the birth: it was holden that both were guilty. *R. v. Bird & Nash, 2 Car. & K. 817.* And where it appeared that a man had, previously to the birth, counselled the woman to conceal it, and she did so, it was holden that as by the 31st section of the statute those who counsel and advise a misdemeanor are to be deemed principal offenders, he and

the woman might be jointly indicted for the concealment. *R. v. Douglas & Hall*, 7 *Car. & P.* 644.

As to the act of concealment: the words of the statute are, "by secret burying or otherwise disposing of the dead body." In a case tried before Rolfe, B., on the northern circuit, where it appeared that the woman, immediately upon the child being born, put it into her box in the bedroom, with intent to remove and dispose of it permanently afterwards, for the purpose of concealing its birth: his Lordship held that it was not a case within the statute; the words, "otherwise disposing of the dead body," must mean a disposal of the same nature as that preceding it in the same sentence, namely, "secret burying," and must be such as was intended by the woman to be a final disposal of it. *R. v. Mary Alton*, *York Sp. Ass.* 1841, *MS.* But in a more recent case, where the woman concealed the child between the bed and the mattress, and it appeared that before her delivery she constantly denied her being with child, and after her delivery persisted in saying that she had not been delivered, but at last confessed to the surgeon that she had,—the woman being convicted, and the case reserved for the opinion of the judges, they held that she was properly convicted. *R. v. Goldthorpe*, *Car. & M.* 335. Where, however, the child was found concealed in a bed among the feathers, but it was not known who placed it there, and it appeared that the mother had sent for a surgeon to attend her in her lying-in, and had prepared clothes for her baby: Park, J., held that these latter facts negatived concealment, and he directed the jury to acquit the prisoner. *R. v. Higley*, 4 *Car. & P.* 366. So, where a woman having gone to a privy for another purpose, the child slipped from her unawares, fell into the soil, and was suffocated: Patteson, J., held that she could not be convicted of concealment, although it was proved also that she had denied the birth of the child. *R. v. Turner*, 8 *Car. & P.* 755. And where the dead body of the child was found in the privy, lying on the top of the soil, just as it would if it had dropped from the mother who had gone there for another purpose,—Platt, B., left it to the jury to say whether it had been thrown there by the prisoner for the purpose of concealment, or whether it had passed from her unawares when she was there for another purpose, in which latter case they ought to acquit her; and she was acquitted. *R. v. Coxhead*, 1 *Car. & K.* 623.

33. Child Stealing.

Indictment.

— } The jurors for our Lady the Queen, upon their
to wit. } oath present, that A. B., on the — day of —,

in the year of our Lord —, feloniously and maliciously did by fraud [*“by force or fraud”*] lead and entice away [*“lead or take away, or decoy or entice away, or detain”*] one C. D., then a child under the age of ten years, to wit, of the age of — years, with intent divers articles, that is to say, [one cloth coat, &c., *stating the articles*] of great value, to wit, of the value of —, which were then upon and about the person of the said child, then feloniously to steal, take, and carry away: against the form of the statute in such case made and provided, and against the peace of our Lady the Queen, her crown and dignity. (*Second count.*) And the jurors aforesaid upon their oath aforesaid do further present, that the said A. B., on the day and year aforesaid, feloniously and maliciously did by fraud lead and entice away the said C. D., then a child under the age of ten years, to wit, of the age of — years, with intent then and thereby to deprive J. D., the father of the said child [*“parent or parents, or other person having the lawful care or charge of such child”*] of the possession of the said child: against the form of the statute in such case made and provided, and against the peace of our Lady the Queen, her crown and dignity. [*Add other counts, if necessary, for detaining the child by fraud, or for taking or detaining it by force.*]

Felony; transportation for seven years;—or imprisonment, with or without hard labour, for not more than two years, and, if a male, to be once, twice, or thrice publicly or privately whipped (if the court shall think fit) in addition to the imprisonment. 9 G. 4, c. 31, s. 21.

Evidence.

To maintain this indictment, the prosecutor must prove—

1. The taking or enticing the child away, as stated in the indictment. This, as in ordinary cases of larceny, must often be implied from circumstances; particularly where the child is too young to be sworn as a witness. Whether done by force or fraud, may readily be presumed by the jury, if it be stated in both ways in the indictment; for the offence cannot, perhaps, be committed by any other means.

2. That the child was at the time under ten years of age. A variance between the age stated and that proved will not be material, provided it be proved to be under ten years.

3. The intent, as stated in the indictment. This, as in other cases of intent, must in general be proved from the admissions or acts of the prisoner, or from other circumstances

from which the jury may fairly infer it. If the prisoner disposed of any of the clothes, although this might be good evidence of a larceny, yet he is not entitled to be acquitted on that account, both offences being felonies ; but, on the contrary, it is good evidence of the intent, under the first count of the above indictment. And if the taking be proved to have been intentional, proof that J. D. is the father of the child will raise a sufficient presumption of the intent laid in the second count.

Two sets of persons are specially exempted from prosecution for this offence: persons claiming a right to the possession of the child, and getting possession of it, and a person claiming to be father of an illegitimate child, taking it out of the possession of the mother, or other person having charge of it. 9 G. 4, c. 31, s. 20.

34. *Abduction of a Girl against her Will, from the Motive of Lucre.*

Indictment.

— } The jurors for our Lady the Queen, upon their
to wit. } oath present, that A. B., on the — day of —,
in the year of our Lord —, feloniously and from motives of
lucre did take away and detain [*“take away or detain”*] a
certain woman named C. D., against her will, with intent her
the said C. D. then to marry ; [*“marry or defile, or to cause
her to be married or defiled by any other person”*] ; she
the said C. D., at the time she was so taken away and
detained by the said A. B. as aforesaid, then having a certain
present and absolute legal interest in certain real and personal
estate, [*“any interest, whether legal or equitable, present or
future, absolute, conditional, or contingent,” or being “an
heiress presumptive or next of kin to any one having such
interest”*] : against the form of the statute in such case made
and provided, and against the peace of our Lady the Queen,
her crown and dignity. [*It may be prudent in some cases to
add a count stating the nature of the property.*

*Felony ; transportation for life, or not less than seven
years ;—or imprisonment, with or without hard labour, for
not more than four years.* 9 G. 4, c. 31, s. 19.

Evidence.

To maintain this indictment, it is necessary to prove—

1. The taking or detaining of C. D., as stated in the indictment.

2. That it was against her will.

3. That she had at the time that interest in property which is stated in the indictment. And this will raise the presumption that the taking was from motives of lucre, particularly if it be proved that the defendant knew it, or knew that she was entitled to property generally, though not knowing the particulars of it.

4. The intent stated, which may be presumed from the words or acts of the prisoner, or of those acting in concert with him. *See ante*, pp. 119, 120.

35. *Abduction of a Girl under Sixteen Years of Age.*

Indictment.

—) The jurors for our Lady the Queen, upon their
to wit. { oath present, that A. B., on the — day of —,
in the year of our Lord —, unlawfully did take and cause
to be taken a certain young unmarried girl named C. D., out
of the possession of J. D., her father, and against the will of
the said J. D. [*“out of the possession and against the will of
her father or mother, or of any other person having the
lawful care or charge of her”*], she the said C. D. being
then an unmarried girl under the age of sixteen years, to wit,
of the age of —: against the form of the statute in such
case made and provided, and against the peace of our Lady
the Queen, her crown and dignity.

Misdemeanor; fine or imprisonment, or both. 9 G. 4,
c. 31, s. 20. *As to costs*, see *ante*, p. 187.

Evidence.

To maintain this indictment, it is necessary to prove—

1. The taking, as stated in the indictment. In one case, Parke, B., ruled that a mere decoying or enticing a girl to go away voluntarily, though by fraudulent pretences, would not amount to the offence contemplated by the statute. *R. v. Meadows*, 1 Car. & K. 399. But in a subsequent case, where it appeared that the girl actually proposed to the man to elope with him, and he, in pursuance of it, went to the father's house at night, placed a ladder against a window, and held it whilst she descended, and both of them then eloped: Atcherley, Serj., held this to be a case within this section; and Tindal, C. J., to whom he afterwards mentioned it, was of the

same opinion. *R. v. Robins*, 1 Car. & K. 456. *S. P. R. v. Bincell*, 11 Shaw's J. P. 582.

2. That the girl was then unmarried, and under sixteen years of age. A variance between the age stated and that proved is not material, provided the age proved be under sixteen. Perhaps it should be ten years at least; for otherwise it might be deemed child stealing (*see ante*, p. 299), which is a felony.

3. That when she was taken, she was in the possession of her father or mother, or of some person having the lawful care or charge of her, as stated in the indictment; and that she was taken against the will of the person in whose possession she is stated to be. And where the consent of the parents was obtained by misrepresentation and fraud, the party having at the time an intent to debauch the girl, Gurney, B., held it to be a case within the statute. *R. v. Hopkins*, 1 Car. & M. 254. It may be doubted, perhaps, whether the taking such a young girl out of the possession of her schoolmistress, with the consent of the schoolmistress, although against the will of her father and mother, be an offence within this Act.

36. *Procuring the Defilement of a Girl under Age.*

Indictment.

— } The jurors for our Lady the Queen, upon their
to wit. } oath present, that A. B., on the — day of —,
in the year of our Lord —, by falsely pretending and representing unto one C. D., that [*here set out the false pretences or representations; the words in the statute are "false pretences, false representations, or other fraudulent means"*], did procure the said C. D. to have illicit carnal connexion with a certain man named —, [or to the jurors aforesaid unknown,] she, the said C. D., at the time of such procurement, being then a woman [or girl] under the age of twenty-one years, to wit, of the age of —: Whereas, in truth and in fact [*negatively the pretences or representations*]: against the form of the statute in such case made and provided, and against the peace of our Lady the Queen, her crown and dignity. [*The false pretences or representations, it should seem, must be specially negatived, in the same manner as in obtaining money or goods under false pretences. See post, tit. "False Pretences."*]

Misdemeanor; imprisonment with hard labour for not more than two years. 12 & 13 Vict. c. 76, s. 1. Costs to be allowed, as in felony. Id. ss. 2, 3.

Evidence.

To maintain this indictment, it is necessary to prove—

1. The pretences or representations made by the prisoner to C. D.

2. That in consequence of these pretences or representations, or other fraudulent means if stated, the defendant procured C. D. to have carnal connexion with the man mentioned in the indictment; and that she was then under twenty-one years of age.

3. That the pretences or representations were false, or that the other means stated were fraudulent.

See *R. v. Mears and Chalk*, 20 *Law J.* 59, *m*, where the prisoners were indicted for an attempt to commit this offence, and for a conspiracy to commit it; and the count for the conspiracy was holden good.

37. *Rape.**Indictment.*

—) The jurors for our Lady the Queen, upon their
to wit.) oath present, that A. B., on the — day of —,
in the year of our Lord —, in and upon one C. D., feloniously and violently did make an assault, and her the said C. D. then violently and against her will, feloniously did ravish and carnally know: against the form of the statute in such case made and provided, and against the peace of our Lady the Queen, her crown and dignity.

Felony, transportation for life, 4 & 5 Vict. c. 56, s. 3. Persons present, aiding and abetting, are equally guilty; R. v. Crisham, Car. & M. 187; and are punishable in like manner. As to costs, see ante, p. 186; costs of apprehension, see ante, p. 189.

Upon this indictment, the jury may find the prisoner not guilty of the felony, but guilty of the attempt to commit it; and thereupon he shall have judgment, as if he had been indicted for the attempt, and had been found guilty; 14 & 15 Vict. c. 100, s. 9; namely, imprisonment, with or without hard labour, for not more than two years, and the court may fine the offender, and make him find sureties for the peace. 9 G. 4, c. 31, s. 25.

Evidence.

Rape is the having carnal knowledge of a woman, by force and against her will. 1 *Hawk. c. 41, s. 2.*

To maintain this indictment, the prosecutrix must prove—

1. Penetration. Formerly it was necessary to prove emission in the body, also. But by stat. 9 G. 4, c. 31, s. 18, (after assigning the punishment of rape, unnatural offences, carnally knowing and abusing girls under the age of ten, and between ten and twelve), and reciting “whereas upon trials for the crimes of buggery and rape, and of carnally abusing girls under the respective ages hereinbefore mentioned, offenders frequently escape by reason of the difficulty of the proof which has been required of the completion of these several crimes:” for remedy thereof it is enacted “that it shall not be necessary, in any of these cases, to prove the actual emission of seed, in order to constitute a carnal knowledge, but that the carnal knowledge shall be deemed complete, upon proof of penetration only.” So that now, evidence of the penetration alone is sufficient, even although the fact of emission be negated by the evidence. *R. v. Cox*, 5 Car. & P. 297. *R. v. Gammon*, 5 Id. 321. *R. v. Allen*, 9 Id. 31. And any, the slightest, penetration,—proof of any part of the virile member of the prisoner having been between the labia of the pudendum of the prosecutrix,—will be sufficient. *R. v. Lines, per Parke, B.*, 1 Car. & K. 393. In one case, indeed, Gurney, B., said, that if the penetration were not sufficient to rupture the hymen, it would not be sufficient to constitute the offence. But this has since been ruled otherwise, and that rupturing the hymen is not at all necessary to the proof of penetration. *R. v. Hughes*, 9 Car. & P. 752. *R. v. Jordan et al.*, 9 Id. 118. And see *R. v. McRue*, 8 Car. & P. 641.

It may be necessary to mention, that a boy under fourteen years of age, cannot, in contemplation of law, be guilty of a rape, or of an assault with intent to commit it; *R. v. Philips*, 8 Car. & P. 736; but he may be convicted, as for an assault; *R. v. Brimilow*, 9 Car. & P. 366; or he may be convicted as being present, aiding and abetting another in the commission of the rape. *R. v. Groombridge*, 7 Car. & P. 582.

2. That it was done by force and against her will. Where a man, by fraud, went to bed to a married woman, and she, believing him to be her husband, allowed him to have connexion with her: this was holden not to be a rape; *R. v. Saunders*, 8 Car. & P. 265; and the same, where in the act the wife discovered it was not her husband, and made what resistance she could to prevent its completion. *R. v. McWilliams*, 8 Car. & P. 286. But where a man gave a woman liquor, which had the effect of rendering her insensible, and he thus took advantage of her situation, and had connexion with her during her insensibility: the judges held this to be a rape, although the jury found that the prisoner had given her

the liquor for the purpose of exciting her, and not for the purpose of rendering her insensible and having connexion with her in that state. *R. v. Camplin*, 1 *Car. & K.* 746. So, where a man had connexion with a woman, whilst she was labouring under delirium, which rendered her insensible to his act; it was holden to be rape. *R. v. Chater*, 13 *Shaw's J. P.*, 766.

In most cases all this has to be proved by the prosecutrix herself, without any other evidence to corroborate her. Lord Hale says, in reference to this: It is true, that rape is a most detestable crime, and therefore severely punished; but it must be remembered that it is an accusation easily made, but difficult to be disproved by the party accused, be he ever so innocent; and therefore, though the party ravished be a competent witness, yet the credibility of her testimony must be left to the jury, upon the circumstances of fact that concur with that testimony:—if the witness be of good fame,—if she presently discovered the offence, and made pursuit after the offender,—if she showed circumstances and signs of the injury, whereof many are of that nature that only women are proper examiners,—if the place where the fact was done were remote from inhabitants or passengers,—if the offender fled for it,—these and the like are concurring circumstances which give greater probability to her evidence. On the other hand, if she be of evil fame, and stand unsupported by other evidence,—if she conceal the case for any considerable time after she had an opportunity to complain, except from fear,—if the place where the fact is supposed to have been committed were near to persons by whom it was probable she might have been heard, and yet she made no outcry,—if she gave wrong descriptions of the place,—if she fixed on a place where it was improbable for the man to have access to her, by reason of his being in a different place or company about that time,—these and the like circumstances afford a strong, though not conclusive, presumption, that her testimony is feigned. 1 *Hale*, 633, 635, and see 1 *Hawk. c.* 41, s. 9. Where the prosecutrix said, that on her way home after the offence was committed, she complained to Mrs. P., and Mrs. P. was called to confirm her, and was asked whether she had made a complaint to her, and was desired to answer “yes” or “no,” without stating what the complaint was, and she said “yes;” she was then asked whether the prosecutrix mentioned the name of any particular person, and Cresswell, J., desired her to answer yes or no, without mentioning the name, and she answered “yes;” she was then asked what name was mentioned, but Cresswell, J., held that that question ought not to be asked. *R. v. Osborne*, *Car. & M.* 622. Where the prosecutrix, after giving evidence of the offence, stated that she immediately told her mistress, Mrs. S., and showed her some blood at the place where the rape

was committed, also that her linen was bloody, and had been washed by Mrs. C.; S. and C. being both in court, Pollock, C.B., directed that they should be called as witnesses on the part of the prosecution; and being called, they gave a direct contradiction to the story of the prosecutrix as respected the complaint, the blood, and the state of the clothes,—and the defendant was accordingly acquitted. *R. v. Stroner*, 1 *Car. & K.* 650.

It is no defence to show that the woman at last yielded to the violence, if she were compelled to it by fear of death or duress. 1 *Hawk. c.* 41, *s.* 6. Nor is it any defence, that she consented after the fact. *Id. s.* 7. Nor is it any defence that she is a common strumpet; for she is still under the protection of the law, and cannot be forced. *Id. s.* 7. But in the latter case, though in itself no defence, it is most material for the defendant, and it is permitted to him to show the fact, to throw a doubt upon her statement that the connexion was had against her will. And the character, therefore, of the prosecutrix for chastity, may be impeached by general testimony; but the defendant cannot examine as to particular facts. *Per Holroyd, J., in R. v. Clarke*, 2 *Starks, N. P. C.* 241. Where the prisoner's counsel asked the prosecutrix, whether she had not before had connexion with other men, and whether she had not before had connexion with a particular person, Wood, B., held that she was not bound to answer the questions, as tending to criminate and disgrace her; it was then proposed to prove that she had been caught in bed with a young man about a year before, and it was proposed to call the young man to prove his having had connexion with her; but Wood, B., would not allow of it, as it was evidence, not of general character, but of particular facts: and the judges afterwards held the decision to be right upon both points. *R. v. Hodgson*, *R. & Ry.* 211. In *R. v. Barker*, (3 *Car. & P.* 389), however, Park, J., after consulting with J. Parke, J., allowed the defendant's counsel to ask the prosecutrix, whether, since the alleged rape, she had not walked the High street at Oxford,—“Were you not on Friday last walking the High street at Oxford, to look out for men?”—“Were you not on Friday last walking the High street at Oxford, with a woman reputed to be a common prostitute?”

Principals in the second degree.] All persons present, aiding, assisting, or encouraging a man to commit a rape, may be indicted as principals in the second degree, whether they be men or women. 1 *Hawk. c.* 41, *s.* 10. Even a boy under fourteen years of age, who, we have seen (*ante*, p. 305), cannot be a principal in the first degree, may be indicted as being present aiding and abetting another to commit the offence. 1 *Hale*, 620. See as to principals in the second degree generally, *ante*, p. 11.

38. *Attempt to commit a Rape.**Indictment.*

— } The jurors for our Lady the Queen, upon their
to wit. } oath present, that A. B., on the — day of —,
in the year of our Lord —, unlawfully did make an assault
upon one C. D., and her the said C. D. did then beat and
ill-treat, with intent her the said C. D. then violently and
against her will feloniously to ravish and carnally to know :
against the form of the statute in such case made and provided,
and against the peace of our Lady the Queen, her crown and
dignity. [*Add a count for a common assault, as ante, p. 282.*

*Misdemeanor, imprisonment with or without hard labour,
for not more than two years; and the court may also fine
the offender, and require him to find sureties for keeping the
peace. 9 G. 4, c. 31, s. 25, see ante, p. 285. As to costs,
see ante, p. 187.*

*Upon this indictment the defendant may be convicted,
although the evidence prove that the offence of rape was
actually completed;—unless the court discharge the jury,
and order the defendant to be indicted for the felony.
14 & 15 Vict. c. 100, s. 12, ante, p. 95.*

Evidence.

To maintain this indictment, the prosecutrix must prove—

1. An attempt at penetration, but not successful,—or prove a struggle with the prisoner, showing from his acts or expressions that his intent was to have connexion with her. Where upon an indictment for an assault with intent to commit a rape, the evidence was, that the defendant, a medical man, being about to administer an injection to the prosecutrix, desired her to place her head on the bed and her feet on the floor, he then raised her clothes and administered the injection, and desired her to remain still, but she found then that he was about to have connexion with her, and had penetrated her person a little, when she immediately arose and ran down stairs, and he quitted the house: Coleridge, J., held, that if this had been committed with force, the offence of rape would have been committed; but as that was not the case, the defendant could not be convicted of an assault with intent to commit a rape, although what he did was sufficient to convict him on a count for a common assault. *R. v. Stanton*, 1 Car. & K. 415.

2. The intent with which the assault was committed, will be

sufficiently indicated by the words or acts of the defendant; the attempt must be made with force and violence, against the will of the prosecutrix, as in rape, *ante*, p. 305. If you prove the assault, but fail in proving the intent, the party may still be convicted on the second count, as for a common assault. Where, upon an indictment against a schoolmaster, for an assault with intent to commit a rape upon one of his female scholars, with a second count for a common assault, it appeared from the evidence that he did not actually attempt to commit a rape, nor perhaps intend it, but he had taken most indecent liberties with the person of the girl, and without her consent, although she did not actually offer resistance: the judges were of opinion that the evidence was fully sufficient to support the count for the common assault, although not that for the assault with intent to commit a rape. *R. v. Nichol, R. & Ry.* 130.

39. Sodomy.

Indictment.

—) The jurors for our Lady the Queen, upon their to wit.) oath present, that A. B., on the — day of —, in the year of our Lord —, in and upon one C. D., feloniously did make an assault, and then feloniously, wickedly, and against the order of nature had a venereal affair with the said C. D., and then feloniously did carnally know the said C. D., and then feloniously, wickedly, and against the order of nature, with the said C. D. did commit and perpetrate the abominable crime of buggery: against the form of the statute, in such case made and provided, and against the peace of our Lady the Queen, her crown and dignity.

Felony, death; 9 G. 4, c. 31, s. 15.

Upon this indictment the jury may find the prisoner not guilty of the felony, but guilty of an attempt to commit it; and thereupon he shall have judgment, as if he had been indicted for the attempt to commit the felony, and was found guilty: 14 & 15 Vict. c. 100, s. 9: namely, imprisonment, with or without hard labour, for not more than two years; and the court may fine the offender, and require him to find sureties for the peace. 9 G. 4, c. 31, s. 25.

Evidence.

The only evidence required, is proof of penetration. *See stat. 9 G. 4, c. 31, s. 18, ante*, p. 305. A man may be guilty of the offence with a woman; and there has been an instance of

a man indicted and tried for having committed this offence upon his own wife, although she resisted as much as she could. *R. v. Jellyman*, 8 Car. & P. 604. If committed with a boy under fourteen years of age, whether as agent, *R. v. Allen*, 2 Car. & K. 869, or pathic, 1 Hale, 670, the adult alone can be convicted. Where, upon an indictment of this kind, it appeared that the prisoner forced open the mouth of a boy of seven years of age, put in his private parts, and in that situation proceeded to a completion of his lust: the judges held that it did not amount to the crime of sodomy. *R. v. Jacobs*, R. & Ry. 331.

Either party, if consenting, is an accomplice; and if he appear as a witness, his testimony must be confirmed. *Per Patteson, J.*, in *R. v. Jellyman*, *supra*.

All persons present, aiding and abetting, are principals in the second degree, and punishable in the same manner as the actors. 1 Hale, 670.

40. *Attempt to commit Sodomy.*

Indictment.

— } The jurors for our Lady the Queen, upon their
to wit. } oath present, that A. B., on the — day of —,
in the year of our Lord —, unlawfully did make an assault
upon one C. D., and him the said C. D. then did beat and ill-
treat, with intent then feloniously, wickedly, and against the
order of nature to have a venereal affair with the said C. D.,
and then feloniously carnally to know the said C. D., and then
feloniously, wickedly, and against the order of nature with the
said C. D., to commit and perpetrate the abominable crime of
buggery: against the form of the statute in such case made
and provided, and against the peace of our Lady the Queen,
her crown and dignity.

Misdemeanor; imprisonment, with or without hard labour for not more than two years; and the court may also fine the offender, and require him to find sureties for keeping the peace. 9 G. 4, c. 31, s. 25. See ante, p. 285. As to costs, see ante, p. 187.

Upon this indictment the defendant may be convicted, although the evidence prove the felony;—unless the court discharge the jury, and order the defendant to be indicted for the felony. 14 & 15 Vict. c. 100, s. 12, ante, p. 95.

Evidence.

The evidence in this case is merely of an attempt to penetrate. Or if resistance were made, then evidence must be given of

the struggle, and of words or acts of the prisoner from which his intent to commit the offence may be implied.

41. *Bestiality.*

Indictment.

— } The jurors for our Lady the Queen, upon their
to wit. } oath present, that A. B., on the — day of —,
in the year of our Lord —, feloniously, wickedly, and
against the order of nature, had a venereal affair with a certain
[cow], and then feloniously did carnally know the said cow,
and then feloniously, wickedly, and against the order of nature
with the said cow did commit and perpetrate the abominable
crime of buggery: against the form of the statute in such case
made and provided, and against the peace of our Lady the
Queen, her crown and dignity.

Felony, death. 9 G. 4, c. 31, s. 15.

*Upon this indictment, the jury may find the prisoner not
guilty of the felony, but guilty of an attempt to commit it;
and thereupon he shall have judgment, as if he had been
indicted for the attempt to commit the felony and was found
guilty; 14 & 15 Vict. c. 100, s. 9; namely, imprisonment,
with or without hard labour, for not more than two years,
and the court may fine the offender, and require him to find
sureties for the peace. 9 G. 4, c. 31, s. 25.*

Evidence.

The only evidence required, is evidence of penetration. See 9 G. 4, c. 31, s. 18, *ante*, p. 305. And where the prisoner, after penetration, was interrupted, and withdrew from the animal (a ewe) before emission: Park, J., held that the offence in law had been completed by penetration alone. *R. v. Cozens*, 6 Car. & P. 351. The offence may be committed with "any animal." 9 G. 4, c. 31, s. 15. Where in the indictment it was called a "bitch," it was holden sufficient, although the females of foxes and of some other animals are so called, as well as the female dog. *R. v. Allen*, 1 Car. & K. 495.

42. *Carnally Knowing a Girl under ten Years of Age.*

Indictment.

— } The jurors for our Lady the Queen, upon their
to wit. } oath present, that A. B., on the — day of —,
in the year of our Lord —, feloniously did unlawfully and

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carnally know and abuse a certain girl named C. D., she the said C. D. being then under ten years of age, to wit, of the age of — years : against the form of the statute in such case made and provided, and against the peace of our Lady the Queen, her crown and dignity.

Felony, 9 G. 4, c. 31, s. 17; *transportation for life*. 4 & 5 Vict. c. 56, s. 3.

Evidence.

To maintain this indictment, it is necessary to prove—

1. Penetration, as in rape. *See stat.* 9. G. 4, c. 31, s. 18, *ante*, p. 305, *and see R. v. Lines there mentioned*. A boy under fourteen years of age cannot be convicted of this offence; in this respect the law is the same as in the case of rape. *See ante*, p. 305. It is no excuse that the girl consented. If you fail in proving the offence, the jury may convict the defendant of an attempt to commit it, 14 & 15 Vict. c. 100, s. 9, *ante*, p. 94, if the evidence warrant it.

2. That the girl, at the time of the committing of the offence, was under ten years of age. A variance in the age between the statement in the indictment and the proof, will not be material, provided the age be proved to be under ten.

As to the competency of the girl to give evidence, *see ante*, p. 150.

43. *Carnally Knowing a Girl, between the Ages of Ten and Twelve.*

Indictment.

— } The jurors for our Lady the Queen, upon their
to wit. } oath present, that A. B., on the — day of —,
in the year of our Lord —, unlawfully did carnally know
and abuse a certain girl named C. D., she the said C. D.
then being above the age of ten years and under the age of
twelve years, to wit, of the age of — years : against the form
of the statute in such case made and provided, and against the
peace of our Lady the Queen, her crown and dignity. [*You
may add a count for a common assault, as ante*, p. 282.

Misdemeanor; imprisonment with or without hard labour,
for such time as the court shall award. 9 G. 4, c. 31, s. 17.
As to costs, *see ante*, p. 187.

*Upon this indictment, the defendant may be convicted of
an attempt to commit the offence*; 14 & 15 Vict. c. 100, s. 9,
ante, p. 94; *in which case he will be punishable with fine or*

imprisonment or both, as for a misdemeanor at common law; and the court may sentence him to hard labour during the whole or any part of the imprisonment. *Id.* s. 29. *Ante*, p. 184.

Evidence.

To maintain this indictment, it is necessary to prove—

1. Penetration, as in rape. *See stat.* 9 *G.* 4, c. 31, s. 18, *ante*, p. 305, and the case of *R. v. Lines* there mentioned. If this be not proved the jury may convict the defendant of an attempt to commit the offence, 14 & 15 *Vict.* c. 100, s. 9, *ante*, p. 124, *R. v. Martin*, 9 *Car. & P.* 213, if the facts proved will warrant it; for which the defendant may now be sentenced to hard labour as well as imprisonment. 14 & 15 *Vict.* c. 100, s. 29. Where it appeared that the defendant effected his purpose by force and against the will of the girl, and it was objected that the offence was rape, and that the defendant could not therefore be convicted on this indictment as for a misdemeanor, Rolfe, B., refused to stop the case, and allowed it to go to the jury, who found the defendant guilty; and to a question from the judge, the jury answered that they were of opinion that the prisoner did effect his purpose by force and against the child's will: the case being reserved for the opinion of the judges, they held that the conviction was right. *R. v. Neale*, 1 *Car. & K.* 591, 1 *Den.* 36. By a late statute (14 & 15 *Vict.* c. 100, s. 12) this point is now put beyond doubt; for it is enacted that if, upon an indictment for a misdemeanor, the evidence prove a felony, the defendant shall not on that account be acquitted, unless the court think fit to discharge the jury from giving a verdict, and order the defendant to be indicted for the felony.

2. That the girl at the time was above the age of ten years, and under the age of twelve. If it appear that she was above the age of twelve, the man of course must be acquitted. But if it appear that she was under the age of ten, still the defendant, it should seem, may be convicted, unless the court discharge the jury, and order him to be indicted for the felony, as above mentioned. A variance between the age stated and that proved, in other respects, will be immaterial.

44. *Indecent Assault.*

Indictment.

— } The jurors for our Lady the Queen, upon their
to wit. } oath present, that A. B., on the — day of —,
in the year of our Lord —, did unlawfully and indecently

assault a certain [girl] named C. D., and did then [*here state what he did*], and did then otherwise ill-treat the said C. D., and other wrongs to the said C. D. then did : against the form of the statute in such case made and provided, and against the peace of our Lady the Queen, her crown and dignity. [*Add a count for a common assault, as ante, p. 282.*]

Misdemeanor ; fine or imprisonment or both ; and, by stat. 14 & 15 Vict. c. 100, s. 29, hard labour during the whole or any part of the imprisonment. Formerly a count for a common assault was sufficient ; but if it be intended that the defendant should be sentenced to hard labour, it must now appear on the face of the count that it was an "indecent assault," to bring it within the above statute.

Evidence.

To maintain this indictment, it must be proved that the defendant took the indecent freedoms with the person of C. D., mentioned in the indictment, or so much of them as amounts to an indictable offence. The taking of any indecent freedoms with the person of another, female or male, not amounting to rape, &c., or an attempt to commit it, against the consent of such other person, or to which he or she submits merely, but does not consent, is in law an assault ; and evidence of it will maintain an indictment for a common assault. The only reason why the form of a special count is above given, is, to bring the case within the stat. 14 & 15 Vict. c. 100, s. 29, which assigns hard labour in addition to imprisonment, as the punishment for an "indecent assault." *See ante, p. 184.* Where, upon an indictment against a schoolmaster, for an assault with intent to commit a rape upon one of his female scholars, with a second count for a common assault, it appeared from the evidence that he did not actually attempt to commit a rape, nor perhaps intend it, but he had taken most indecent liberties with the person of the girl, and without her consent, although she did not actually offer resistance : the judges were of opinion that the evidence was fully sufficient to sustain the count for the common assault, although not the count for the assault with intent to commit a rape. *R. v. Nichol, R. & R. 130.*

So, where a girl went to a quack doctor to be cured of some complaint, and he, pretending that he could not otherwise judge of her illness, than by seeing her naked, pulled off her clothes : being indicted for this specially, and also upon a count for a common assault, the jury being of opinion that the defendant did not really think that his seeing the girl naked would assist him in judging of her illness, found him guilty ; and the judges held the conviction good upon the count for a

common assault. *R. v. Rosinski, MS. and Ry. & M.* 19. So, where a girl of fourteen years of age was placed by her parent under the care of the defendant, a medical man, in consequence of illness arising from suppressed menstruation; he accordingly gave her medicines, and on her coming to his house, and informing him that she was no better, he said,—"then I must try further means with you,"—and he thereupon took hold of her, laid her down in the surgery, took up her clothes, and had connexion with her, to which she made no resistance, believing, as she swore, that she was submitting to medical treatment for the ailment under which she laboured: the defendant being indicted for an assault at the quarter sessions for Dover, the Recorder told the jury that the girl being of an age to consent, if she consented knowing the nature of what the defendant was doing to her, it could not be deemed an assault, but if they were satisfied that she was ignorant of the nature of the defendant's act, and *bonâ fide* believed that he was, as he represented, treating her medically with a view to her cure, it was an assault; and the jury convicted him: this case being brought before the criminal appeal court, the judges held that the Recorder had put the case very properly to the jury, and that the conviction was right. *R. v. Case*, 19 *Law J.* 174 *m.*

But where a man was indicted for carnally knowing a girl between the ages of ten and twelve, and in other counts for an assault to do so, and for a common assault: and the evidence only proved an attempt to have carnal knowledge, which hurt the girl, but which appeared to have been done perfectly with her consent: the judges held that the defendant could not be convicted for the assault with intent, &c., or for the common assault, it being done with the girl's consent; but that he might be indicted for a misdemeanor in attempting to commit the offence. *R. v. Martin*, 9 *Car. & P.* 213. So, where three boys, each under the age of fourteen years, had connexion with a girl nine years old, with her assent, and as from their ages they could not be indicted for the felony, they were indicted for an assault,—the jury found them guilty, saying at the same time that the girl was an assenting party, but that from her tender years she did not know what she was about: but the case being referred to the criminal appeal court, the judges held that as the jury had actually found that the girl consented, the conviction was wrong. *R. v. Read et al.*, 2 *Car. & K.* 957. However, a girl's merely submitting to such an act, is not to be deemed conclusive of her consent to it, as it might in the case of a woman or adult girl, but the jury will have to judge from the facts of the case, whether she consented willingly, or merely submitted to it from fear, and if the latter, the defendant may be convicted. *R. v. Day*, 9 *Car. & P.* 722, *per Coleridge, J.*

SECTION II.

*Offences against the Reputation of Individuals.*1. *Libel.**Indictment.*

— } The jurors for our Lady the Queen, upon their
to wit. } oath present, that A. B., on the — day of —,
in the year of our Lord —, unlawfully and maliciously did
write [print] and publish a certain false, scandalous and mali-
cious defamatory libel of and concerning one C. D.; which
said libel is as follows, that is to say: [*Here set out the libel,
with such innuendos as may be necessary to fix its meaning.*]
[And the jurors aforesaid upon their oath aforesaid do further
present, that at the time the said A. B. so wrote, printed, and
published the said false, scandalous and malicious defamatory
libel, he the said A. B. knew the same to be false:] against
the form of the statute in such case made and provided, and
against the peace of our Lady the Queen, her crown and
dignity. [*As to the venue, see ante, p. 68.*]

1. *If maliciously published, fine or imprisonment, or both, the imprisonment not to exceed one year. 6 & 7 Vict. c. 96, s. 5.*

2. *If maliciously published, the defendant knowing the same to be false,—imprisonment for not more than two years, and fine. Id. s. 4.*

The indictment must show that the libel was written, &c. “of and concerning” the prosecutor. R. v. Marsden, 4 M. & S. 164. It must also contain the necessary innuendos— (“thereby meaning,” &c.)—to fix the meaning of any expression in the libel, that may require explanation. See R. v. Burdett, 4 B. & A. 314. Sometimes it is necessary, when a libel relates to a particular transaction, to state the transaction by way of inducement, so as to render the libel intelligible, and show that it has relation to the prosecutor. It is thus introduced:—that the jurors, &c. “present, that before the commission of the offence hereinafter mentioned” [&c., stating the transaction alluded to]; and that A. B., well knowing the premises, but intending to vilify and defame the said C. D., on — unlawfully and maliciously did write,” &c., as in the above form.

Plea, &c.

The defendant, to any indictment for a defamatory libel, may now plead the truth of the libel, if he state in his plea that it was for the public benefit that the matters charged should be published, and show the particular fact or facts by reason of which the publication was for the public benefit. 6 & 7 Vict. c. 96, s. 6. And he may also at the same time plead not guilty; under which he may give in evidence any other defence, of which he might have availed himself before the passing of this Act. *Id.* But he shall not be allowed to prove the truth of the libel, unless he plead it. *Id.* The following may be form of the

Pleas of Not Guilty and a Justification.

And the said A. B., in his own proper person, cometh into court here, and having heard the said indictment read, saith that he is not guilty of the premises in the said indictment, above laid to his charge; and of this he the said A. B. puts himself upon the country, &c.

And for a further plea in this behalf, the said A. B. saith that our Lady the Queen ought not further to prosecute the said indictment against him; because he saith that it is true [&c.]; and it is true that [&c., so, alleging the truth of each of the libellous parts of the publication]; and the said A. B. in fact saith that heretofore and before the publication in the said indictment mentioned, to wit, on — [here state the fact or facts which rendered the publication of benefit to the public]; by reason whereof it was for the public benefit that the said matters so charged in the said indictment should be published. And this he the said A. B. is ready to verify; and therefore he prayeth judgment, and that by the court here he may be dismissed and discharged from the said premises in the said indictment specified.

The following may be the form of the

Replication.

And hereupon E. F. [the clerk of assize or clerk of the peace], who prosecutes for our Lady the Queen in this behalf, saith that as to the plea of the said A. B. by him firstly above pleaded, and whereof he hath put himself upon the country, he the said E. F., on behalf of our Lady the Queen, doth the like.

And as to the plea of the said A. B., by him secondly above pleaded, the said E. F. saith that by reason of any thing in the said second plea of the said A. B. above pleaded in bar alleged, our said Lady the Queen ought not to be precluded from further prosecuting the said indictment against the said A. B.; because he saith that he denies the said several matters in the plea by the said A. B. alleged to be true, and saith that the same are not true, as in the said plea is above alleged; and this he the said E. F. prays may be enquired of by the country. And the said A. B. doth the like. Therefore let a jury, &c.

I know of no instance of a replication of *de injuriâ* in criminal cases; and even if there were, yet as the defendant in this case justifies under a statute, that form of replication could not here be adopted. I have therefore followed the directions of the statute, which, after giving directions for the plea, says—"to which plea the prosecutor shall be at liberty to reply generally, denying the whole thereof;" it then adds, that—if, after such plea, the defendant shall be convicted on such indictment or information, it shall be competent to the court, in pronouncing sentence, to consider whether the guilt of the defendant is aggravated or mitigated by the said plea, and by the evidence given to prove or to disprove the same.

Evidence under the General Issue, for the Prosecution.

The publication, &c.] Where the general issue is pleaded, the prosecutor always begins. And to maintain the indictment, he must first prove publication; for unless the libel have been published, those who have composed, written, or printed it, are not punishable. But upon publication being proved, the prosecutor may proceed to give evidence against any of the defendants who may have composed, written, or printed the libel; for they are all principals, and all may be included in the same indictment.

Publishing it in a newspaper is deemed a publication by the proprietor; *R. v. Walter*, 3 *Esp.* 21; and if the defendant procured it to be published in a newspaper, it is a publication by him. *Adams v. Kelly, Ry. & M.*, *N. P. C.* 157. 1 *Hawk.* c. 73, s. 10. The sale of it in a bookseller's shop is a publication by the bookseller. But it is provided, by stat. 6 & 7 *Vict.* c. 96, s. 7, that whensoever upon the trial of an indictment or information for the publication of a libel, under the plea of not guilty, evidence shall have been given, which shall establish a presumptive case of publication against the defendant by the act of any other person by his authority, it shall be competent to such defendant to prove that such publication was made without his authority, consent, or knowledge, and

that the said publication did not arise from want of due care or caution on his part. The libel, if contained in a letter, may be published even by sending the letter to the prosecutor himself. 1 *Hawk. c. 73, s. 11*. In the case of a newspaper, the prosecutor may prove the purchasing of it at the shop or place of publication of the defendant; or he may give in evidence a certified copy of the defendant's declaration of his being the printer or publisher of the paper, procured from the Stamp office, and a copy of the newspaper containing the libel, intituled as therein mentioned, in which case it will not be necessary to prove the purchase of the paper. 6 & 7 *W. 4, c. 76. ss. 6—8*. And in all cases, the publication must be proved to have been in the county in which the venue is laid. *See ante*, p. 68.

And as the jury, on not guilty pleaded, are enabled, if the matter published be really not a libel, to give a general verdict of not guilty, although the publication be proved, and are therefore in some degree judges of the law as well as of the fact,—it is necessary to state here, shortly, what in law is deemed a defamatory libel on an individual. Writings against individuals, or against any body of persons, such, for instance, as the clergy of a diocese, *R. v. Williams*, 5 *B. & A.* 595, accusing them of any offence punishable by law, or imputing to them conduct calculated to degrade them in the eyes of mankind, or expose them to public hatred, contempt, or ridicule, are deemed libels; and as they tend to provoke a breach of the peace, are, if published, punishable as misdemeanors, as above mentioned. 1 *Hawk. c. 73, s. 1*. So libels may be expressed by signs or pictures, caricatures, hanging in effigy, &c. *Id. ss. 2, 3*. And, if in writing or printing, it is immaterial whether they be expressed in direct terms, or by way of implication, or ironically, or the like, *Id. s. 4, and see R. v. Kinnersley*, 1 *W. Bl.* 294, *R. v. Benfield*, 2 *Burr.* 985, or whether the prosecutor be named expressly, or by initials, or in any other manner showing that it is intended to apply to him. 1 *Hawk. c. 73, s. 5*.

So publishing libellous matter, reflecting upon the conduct of a person deceased, is in like manner punishable, if it be such as is calculated to incite his surviving relations to a breach of the peace, or expose them to the hatred of the people or their neighbours. *See R. v. Topham*, 4 *T. R.* 126.

So, publications tending to degrade and defame persons in considerable stations of power or dignity in foreign countries, may be treated as libels, on the ground that they may tend to involve this country in disputes and war. *R. v. Peltier*, *Starkie on Libel*, 218.

That defendant knew it to be false.] This may be proved from the admissions or overt acts of the defendant, or by proof

of any other facts from which the jury may infer it. The prosecutor should first prove that the matter of the libel is false in fact; or the jury may presume it, from the defendant not having specially pleaded the truth of the libel in his justification.

Evidence under the General Issue, for the Defendant.

Denial of publication.] In ordinary cases, the defendant may prove that he did not publish the libel, or write or print it; and we have seen (*ante*, p. 318) that where, although published by another, and presumptive proof is given that it was published by his authority, he may prove that it was published without his authority, consent, or knowledge. But where it is published in a newspaper, and a certified copy of the defendant's declaration is produced, it is conclusive of his being the printer or publisher of the paper.

Privileged communication.] Where a man gives a true character of a servant, *Child v. Affleck*, 9 B. & C. 403,—where A. writes to B., complaining of the conduct of a person employed by both of them, in a matter in which they are jointly interested, *McDougal v. Claridge*, 1 Camp. 267,—a communication from a person, desired by a master to inform him of any breach of duty by his servant, *Cockayne v. Hodgkinson*, 5 Car. & P. 543,—a complaint made to a superior officer of an inferior, *bonâ fide* and for the purpose of obtaining redress, *Woodward v. Lander*, 6 Car. & P. 548. *Fairman v. Ives*, 5 B. & A. 642,—a letter written to a relation, informing her of the character of the person she was about to marry, *Todd v. Hawkins*, 8 Car. & P. 88,—and the like, are privileged communications, and are not the subject of an indictment for a libel. This is a good defence, therefore, under the general issue.

Proceedings in Parliament.] If a member of Parliament, in speaking in either House, make use of defamatory language with respect to an individual, there is no remedy for it, civil or criminal. So, where papers are published by order of either House, which happen to be defamatory of a private individual,—if he take any proceedings civil or criminal against the publisher, then, upon the latter producing to the court a certificate under the hand of the Lord Chancellor or of the Speaker of the House of Commons, verified by affidavit, stating that the paper in question was published by the defendant by order of the House, the court shall immediately stay the proceedings, which shall thereupon be deemed to be finally determined. 3 & 4 Vict. c. 9. But if a member of Parliament

publish his own speech, *R. v. Creevey*, 1 *M. & S.* 273, or if any other person publish it, and it be libellous, it will be no answer to an indictment for the libel, to say that the member was privileged in speaking the matter published in his place in Parliament. So, a person presenting a petition to Parliament, is not liable to indictment or action, if it happen to reflect upon the character of another; 1 *Hawk. c.* 73, *s.* 8; and the same, if the party have the petition printed, and distribute copies amongst the members; *Id. s.* 15; but if he deliver a copy to any other person, he will be just as liable to punishment as for any ordinary publication. *Id. s.* 12.

Proceedings in courts of justice.] No false or scandalous matter contained in articles of the peace exhibited to justices, or in any other proceeding in a regular course of justice, will make the complaint amount to a libel. 1 *Hawk. c.* 73, *s.* 8. And the same, as to statements in the presentment of a grand jury, *Id.*,—in the finding or judgment of a court martial, *Jekyll v. Sir John Moore*, 2 *New R.* 341, 1 *Russ.* 224, 225,—in affidavits filed or made use of in court, *Astley v. Young*, 2 *Burr.* 817,—and the like. But if those, or any other proceedings in courts of justice be published out of court, the party will be liable to indictment, as he would for any other publication of the same libellous matter. *R. v. Carlisle*, 3 *H. & A.* 167. *R. v. Fleet*, 1 *B. & A.* 379.

What no justification.] But it will be no excuse that the defendant copied the libel from another publication, although he mentioned the source from which he derived it. 1 *Russ.* 223.

Evidence in respect of the Special Plea.

In support of the plea, stating the truth of the libellous matter, *ante*, p. 317, the defendant must prove the truth of all the passages which are libellous. If he do not, and the matter he fails to prove be libellous, he must be convicted, and his proof of part can only be taken into consideration by the court in passing judgment; but if the only part he fails to prove, happen not to be libellous, his justification of that part may be rejected as surplusage, and he will be entitled to judgment on that issue.

The prosecutor, on the other hand, will be entitled to disprove the plea, by showing that all the passages in the libel, alleged by it to be true, are false.

Verdict, Judgment, and Costs.

Verdict.] It was holden at one time, that what is or is not libel, was matter of law on the face of the record, for the con-

sideration of the court; that the province of the jury was confined to the finding of the fact of publishing and the truth of the innuendoes; and that if the matter published were not a libel, the defendant after conviction might move in arrest of judgment. 1 *Hawk. c. 73, s. 16.* 5 *Burr. 2666.* *R. v. Dean of St. Asaph, 3 T. R. 428 n.* *R. v. Withers, 3 T. R. 423.* But by stat. 32 G. 3, c. 60, s. 1, it was enacted that upon every trial on an indictment or information for a libel, the jury may give a general verdict of guilty or not guilty upon the whole matter put in issue, and shall not be required or directed by the judge to find the defendant guilty, on proof merely of his having published the libel, and of the sense ascribed to the same by such indictment or information. But it is provided that the judge shall, according to his discretion, give his opinion and directions to the jury, in like manner as in other criminal cases; *Id. s. 2*; and the jury may, in their discretion, find a special verdict; *Id. s. 3*; or after a verdict of guilty, the defendant may move in arrest of judgment, as formerly. *Id. s. 4.*

Judgment.] The punishment for libel at common law, was fine or imprisonment, or both. But the punishment now, so far as respects imprisonment, is limited: by stat. 6 & 7 Vict. c. 96, s. 4, if any person maliciously publish a defamatory libel (meaning the ordinary cases of libels against individuals), the punishment shall be fine or imprisonment or both, the imprisonment not to exceed one year; and by sect. 5, if any person shall maliciously publish a defamatory libel, knowing the same to be false, imprisonment for not more than two years and fine.

And if, after a special plea of justification, averring the truth of the libel, the defendant shall be convicted, it shall be competent to the court, in pronouncing sentence, to consider whether the guilt of the defendant is aggravated or mitigated by the said plea, and by the evidence given to prove or disprove the same. 6 & 7 Vict. c. 96, s. 6.

Costs.] If the defendant be acquitted, he shall be entitled to recover from the prosecutor the costs he shall have sustained by reason of the indictment; and in the case of a special justification, if the issue thereon be found for the prosecutor, he shall be entitled to recover from the defendant the costs he shall have sustained by reason of such plea:—such costs so to be recovered by the defendant or prosecutor respectively, to be taxed by the proper officer of the court where the indictment is tried. 6 & 7 Vict. c. 96, s. 8.

Threatening to Libel, &c. with Intent to Extort. 823

2. Threatening to publish a Libel, &c., with intent to extort Money, &c.

Indictment.

— } The jurors for our Lady the Queen, upon their
to wit. } oath present, that A. B., on the — day of —,
in the year of our Lord —, did threaten one C. D., to publish
a certain libel of and concerning him the said C. D., [“*if
any person shall publish, or threaten to publish, any
libel upon any other person,—or shall directly or indirectly
propose to abstain from printing or publishing,—or shall
directly or indirectly offer to prevent the printing or publish-
ing, of any matter or thing touching any other person,*”]
with intent then and thereby to extort money from the said
C. D. [“*with intent to extort any money or security for money,
or any valuable thing, from such or any other person,—or
with intent to induce any person to confer or procure for any
person any appointment or office of profit or trust*”]: against
the form of the statute in such case made and provided, and
against the peace of our Lady the Queen, her crown and dig-
nity. [If there be a doubt whether the matter threatened
to be published be libellous, add a second count, charging
that the defendant “did propose to the said C. D., to abstain
from printing and publishing a certain matter and thing touch-
ing the said C. D. [or one E. F.], with intent,” &c.]

*Misdemeanor; imprisonment, with or without hard labour,
for not more than three years. 6 & 7 Vict. c. 96, s. 3.*

Evidence.

To maintain this indictment, the prosecutor must prove—

1. The threat to publish the libel, and the nature of it. Or under the second count, the defendant's proposal to abstain from publishing, &c., and the nature of the matter intended.

2. The intent to extort, &c. ; which may be proved from the admissions or acts of the defendant, or by evidence of any facts from which the jury may fairly infer it. *See ante*, p. 119, 120. Under the word “money,” you may give in evidence an intent to extort bank notes. 14 & 15 Vict. c. 100, s. 18, *ante*, p. 90.

3. Letter threatening to accuse of Crime, with intent to extort.

Indictment.

— } The jurors for our Lady the Queen, upon their
to wit. } oath present, that A. B., on the — day of —,
in the year of our Lord —, knowingly and feloniously did

324 *Threatening Letter, with Intent to Extort.*

send [*“ send or deliver or utter ”*] to one C. D., a certain letter, [*“ letter or writing ”*] directed to the said C. D. by the name and description of Mr. C. D., threatening to accuse him the said C. D. [*“ accusing or threatening to accuse either the person to whom such letter or writing shall be sent or delivered, or any other person, ”*] of a certain crime punishable by law with transportation, to wit, — [*“ of any crime punishable by law with death or transportation,—or of any assault with intent to commit any rape, or of any attempt or endeavour to commit any rape,—or of any crime in and by stat. 7 & 8 G. 4. c. 29, defined to be an infamous crime, ”**] with the view and intent then by means of the said threatening letter, to extort and gain from the said C. D., money [*“ any property, money, security, or other valuable thing from any person whatever ”*]; and which said letter is as follows, that is to say,—[*here set out the letter verbatim*]: against the form of the statute in such case made and provided, and against the peace of our Lady the Queen, her crown and dignity. [*The venue may be laid, either in the county where the letter was received, or in that from which it was sent. See ante, p. 74.*

Felony ; transportation for life, or for not less than seven years ;—or imprisonment, with or without hard labour, for not more than four years, and, if a male, to be once, twice, or thrice publicly or privately whipped (if the court think fit) in addition to such imprisonment. 10 & 11 Vict. c. 66, s. 1.

Evidence.

To maintain this indictment, the prosecutor must prove—

1. The sending of the letter containing the threat, as mentioned in the indictment. For this purpose he must produce the letter, and prove that he received it. It must then be proved that the prisoner sent or delivered it; for proof merely that it is in his handwriting, even by his own confession, will not be sufficient, *R. v. Howe*, 7 Car. & P. 268, although that, coupled with other circumstances may. Proof that he dropped a letter, directed to the prosecutor, into the prosecutor's premises, where it was likely to be found either by the prosecutor himself, or by some person who would deliver it to him, was holden by the judges to be a sending of the letter. *R. v. Wagstaff*, R. & Ry. 398. So, proof that he left the

* The crimes defined to be infamous, by stat. 7 & 8 G. 4, c. 29, s. 9, are “the abominable crime of buggery committed with mankind or beast,—and every assault with intent to commit the said abominable crime,—and every attempt or endeavour

to commit the said abominable crime,—and every solicitation, persuasion, promise or threat offered or made to any person whereby to move or induce such person to commit or permit the said abominable crime.”

letter at a gate in the road near the prosecutor's house, where it was found by a person passing, who forwarded it to the prosecutor, and being left in the steward's room, he opened it and gave it to a constable, and the constable showed it to the prosecutor: the judges held this to be good evidence to go to the jury of a sending to the prosecutor; if a man leave a letter in any place, with intent that it shall be found, and ultimately delivered to the party for whom he intends it, that is a sending of it to the party. *R. v. Grimwade*, 1 Car. & K. 592. So, proof that the prisoner sent it to another person, with intent that such person should send or deliver it to the prosecutor, will support the allegation that he sent it to the prosecutor. *R. v. Paddle*, R. & Ry. 484. See *R. v. Jones*, 2 Car. & K. 398.

2. The letter being proved, it must be read, and the prosecutor or other witness must give such explanation, if necessary, as to render any doubtful passage in it intelligible.

Where upon an indictment for sending a threatening letter, it did not sufficiently appear from the letter itself, of what offence the prisoner threatened to accuse the prosecutor: the judge, however, admitted parol evidence to explain it; and the prosecutor proved that having asked the prisoner what he meant by certain expressions in the letter, he answered that he meant that the prosecutor had taken indecent liberties with his person; and at the trial, the prisoner himself asked the prosecutor whether he had not taken such liberties with him, which the prosecutor denied: the defendant being found guilty, the judges were of opinion that this parol evidence was properly received, and that the conviction was right. *R. v. Tucker*, Ry. & M. 134.

3. The intent to extort, as stated in the indictment. This generally appears upon the face of the letter itself; but if not, such facts, or such expressions of the defendant, from which the jury may fairly presume it, must be proved.

4. *Accusing or Threatening to accuse, with Intent to Extort.*

Indictment.

— } The jurors for our Lady the Queen, upon their
to wit. } oath present, that A. B., on the — day of —,
in the year of our Lord —, feloniously did threaten one
C. D. to accuse him [*“accuse or threaten to accuse either
the person to whom such accusation or threat shall be made,
or any other person”*] of a certain crime punishable by law
with transportation [*see the last case, ante, p. 324*], to wit,
—, with the view and intent then and thereby to extort and

gain money from the said C. D. [*“to extort or gain from the person so accused or threatened to be accused, or from any other person whatever, any property, money, security, or other valuable thing”*]: against the form of the statute in such case made and provided, and against the peace of our Lady the Queen, her crown and dignity. [*Where the indictment merely charged the defendant with having threatened to accuse the prosecutor of, &c., the judges held it to be insufficient; it should have stated that he threatened the prosecutor to accuse him, &c.* *R. v. Dunkely et al., Ry. & M.* 90.

Felony; transportation for life, or for not less than seven years;—or imprisonment, with or without hard labour, for not more than four years, and, if a male, to be once, twice, or thrice publicly or privately whipped (if the court think fit), in addition to such imprisonment. 10 & 11 Vict. c. 66, s. 2.

Evidence.

To maintain this indictment, the prosecutor must prove—

1. The threat, or accusation, as stated in the indictment. Where the prisoners were indicted for extorting from A. B. a security for money, by accusing him of sodomy, and the evidence was, that they insisted on having the security, because he had taken “indecent liberties” with C. D.; but to the prosecutor’s niece, who demanded an explanation, they said it was a “sodomitical affair:” It was left to the jury to say whether the prisoners meant to accuse the prosecutor of sodomy, by charging him with taking indecent liberties with C. D. *R. v. Bennett*, 14 *Shaw’s J. P.* 514. But where a man was already indicted for a rape, and another person, not connected with the prosecution, threatened him, that if he did not give him 30*l.*, he would hire witnesses to prove him guilty: this was holden not to be a threat to accuse; the accusation had been already made, and this was at most a threat to support it by evidence. *R. v. Joseph Gill, cor. Bayley, J., Sum. Ass. York*, 1829. And the evidence must show that the threat was holden out to the prosecutor; see *R. v. Dunkely et al., supra*; or if it appear that he made use of it to a third person, with intent that he should mention it to the prosecutor, and it was mentioned accordingly, this would probably be deemed sufficient within the meaning of the Act. See *R. v. Paddle, R. & Ry.* 484.

2. The intent to extort, as stated in the indictment. This may be implied from the threat or accusation itself, the manner in which it was made, the expressions used by the defendant, or other facts.

5. Accusing, or Threatening to accuse, and thereby Extorting Money, &c.

Indictment.

— } The jurors for our Lady the Queen, upon their
to wit. } oath present, that A. B., on the — day of —,
in the year of our Lord —, feloniously did accuse [*“accuse
or threaten to accuse”*] one C. D. of the abominable crime of
buggery with mankind, to wit, with him the said A. B. [*“of
the abominable crime of buggery committed with mankind
or with beast,—or of any assault with intent to commit the
said abominable crime, or of any attempt or endeavour to
commit the said abominable crime,—or of making or offering
any solicitation, persuasion, promise, or threat to any
person, whereby to move or induce such person to commit or
permit the said abominable crime”*], with a view and intent
then and thereby to extort and gain from the said C. D. some
property; and the said A. B., by intimidating the said C. D.
by the said accusation [*“accusation or threat”*], did then
feloniously extort and gain from the said C. D. [*here state
what: if money or bank notes, say, “certain money to the
amount of — pounds.” See 14 & 15 Vict. c. 100, s. 18,
ante, p. 90*]: against the form of the statute in such case
made and provided, and against the peace of our Lady the
Queen, her crown and dignity.

*Felony; transportation for life, or not less than fifteen
years;—or imprisonment, with or without hard labour, for
not more than three years. 1 Vict. c. 87, s. 4.*

*This offence formerly amounted to robbery, and was
punishable with death; 7 & 8 G. 4, c. 10, s. 7; but the
section of the statute by which it was declared to be robbery,
was repealed by stat. 1 Vict. c. 87, s. 1.*

Evidence.

To maintain this indictment, the prosecutor must prove—

1. The accusation or threat, as in the last case, *ante*, p. 326,
Where the accusation was made to the wife of the party
accused, and she was induced to give the prisoners money, it
was holden not to be within a former statute on the subject,
7 & 8 G. 4, c. 29, s. 7. *R. v. Edwards et al.*, 5 Car. & P.
518. And upon that statute, it was also said, that it was
immaterial whether the party accused was guilty of the offence
imputed to him or not. *Per Littledale, J.*, in *R. v. Gardner*,
1 Car. & P. 479.

2. The intent to extort, as in the last case.

3. That through intimidation from the accusation or threat,
he gave the prisoner the money or property, as mentioned in
the indictment.

SECTION III.

*Offences against the Habitations of Individuals.*1. *Burglary,**Indictment.*

— } The jurors for our Lady the Queen, upon their
to wit. } oath present, that A. B., on the — day of —,
in the year of our Lord —, about the hour of eleven in the
night of the same day, the dwelling-house of C. D., situate in
the parish of —, in the county of —, feloniously and bur-
glariously did break and enter, with intent the goods and
chattels of the said C. D., in the said dwelling-house then
being, then in the said dwelling-house feloniously and burgla-
riously to steal, take, and carry away; and the said A. B.
then in the said dwelling-house [one cloth coat and one waistcoat
of the value of five pounds] of the goods and chattels of the
said C. D., in the said dwelling-house then being found, then
feloniously and burglariously did steal, take, and carry away:
against the form of the statute in such case made and provided,
and against the peace of our Lady the Queen, her crown and
dignity. [*In ordinary cases it is not necessary to state the
value of the goods stolen, unless the value be of the essence
of the offence. Here they are stated to be of the value of
five pounds, in order that the defendant, if acquitted of the
burglary, may be found guilty of larceny in the dwelling-
house to the value of five pounds. If the goods stolen be not
of that value, the statement of the value may be omitted.*]

*The venue must be laid in the county in which the house
is situate. Or where the house is situate on the boundary
between two counties, or within five hundred yards of the
boundary, it seems that the indictment may be preferred in
either county. Ante, p. 65. 1 Russ. 827.*

*The indictment must show that the breaking and entering
was in the night time; and it states the hour, to show that
they were so; for by stat. 1 Vict. c. 86, s. 4, the night time,
as relates to burglary, commences at nine o'clock in the even-
ing and ends at six in the morning.*

*It must allege the breaking and entering, &c., to have been
done "burglariously" as well as feloniously. This is essen-
tially necessary, and if it be omitted, the indictment will be
bad. See ante, p. 91.*

*It must show that the house is a dwelling-house; and
even if the burglary have been committed in an out-house*

belonging to the dwelling house, and connected with it as herein-after mentioned, yet, inasmuch as it is a part of the dwelling-house, the offence is usually alleged to have been committed in the dwelling-house; or the indictment may allege it to have been committed in the out-house, stating the out-house to be a part of the dwelling-house. 2 East, P. C. 512. And the name of the owner, or rather the occupier, must be stated. See post, p. 336. So a local description of the house,—the parish, township or place and county, in which it is situate,—must be stated. See ante, p. 119. Where it was stated to be situate “at Norton-juxta-Kempsey,” without saying whether it was a parish or township, &c., Patteson, J., held it to be sufficient. *R. v. Brookes et al.*, Car. & M. 544. But a mistake, either in the ownership or the local description, may be amended at the trial. See ante, p. 100.

The intent must be stated, and it must be to commit a felony; and if a felony have been actually committed in the house, the intent may be, and usually is, stated to have been to commit that felony. But it seems that an indictment for burglary may in this respect be drawn in three ways:—stating the breaking and entry to be with intent to commit a felony,—stating the breaking and entry, and a felony actually committed, 1 Hale, 500. *R. v. Furnival*, R. & Ry. 445. *R. v. Vandercomb and Abbot*, 2 East, P. C. 514,—or stating the breaking and entry with intent to commit a felony, and also stating the felony to have been actually committed. The latter is the preferable mode, and that always adopted in practice; for if you fail to prove the felony committed, you may still convict of the burglary, or if you fail to prove the intent, &c., you may convict of the felony. The intent must appear to be to commit a felony in the dwelling house; see *R. v. Watkins*, Car. & M. 264; but if the intent alleged be to commit a larceny, it is not necessary to show whose goods they were, it is sufficient to state them to be “the goods and chattels in the said dwelling-house then being;” *R. v. Clarke*, 1 Car. & K. 421; afterwards, however, in stating the larceny actually committed, the ownership must be stated, as in an indictment for larceny.

Felony; transportation for life, or not less than ten years;—or imprisonment, [with or without hard labour, s. 7], for not more than three years. 1 Vict. c. 86, s. 3. If accompanied by an assault with intent to murder, or if the offender stab, cut, wound, or strike any person in the house, the punishment is death. Id. s. 2. See post, p. 341. Accessories before the fact are punishable in the same manner; accessories after the fact (not being the receivers of the stolen property), by imprisonment [with or without hard labour, Id. s. 7], for not more than two years, Id. s. 6. As to costs, see ante, p. 186; costs of apprehension, see ante, p. 189.

Burglary.**Evidence.**

Burglary is the breaking and entering of the dwelling-house of another, in the night time, with intent to commit a felony therein. To maintain this indictment, therefore, the prosecutor must prove :—

1. A breaking of the dwelling-house. The breaking necessary to constitute burglary, is either actual or constructive: actual, by the actual and forcible breaking or removal of the door, window, or other part of the house, whereby an entry may be effected; constructive, where an entry is effected by fraud or artifice. If a man break a hole in the wall of a house, it is of course a breaking. 1 *Hawk. c. 38, s. 6*. If he break the outer door, or unlock it, *Id.* or open it by picking the lock or even lifting the latch, 1 *Hale, 552*. 2 *East, P. C. 487*. *R. v. Jordan et al., 7 Car. & P. 432*. And see *Pugh v. Griffith, 7 Ad. & E. 836*, or by taking the glass out of a glass door, *R. v. Smith, R. & Ry. 417*, or if he raise a trap door which is kept down merely by its own weight, *R. v. Russell, Ry. & M. 377*. *Brown's case, 2 East, P. C. 487*, these are all instances of a breaking sufficient in burglary; but if he open a door which is not fastened or latched, it is otherwise. If a man open a window, by putting up the sash, 1 *Hawk. c. 38, s. 6*. *R. v. Hyams, 7 Car. & P. 441*, or by pulling down the upper sash which was kept in its place merely by the pulley weight, *R. v. Haines et al., R. & Ry. 451*, or by breaking a pane in it, and putting in his hand to open the fastening, *R. v. Perkes, 1 Car. & P. 300*. *R. v. Bird, 9 Car. & P. 44*. *R. v. Roberts, alias Chambers, 2 East, P. C. 487*, or by making a hole in the glass larger, for the purpose of getting his arm in, *R. v. Robinson et al., Ry. & M. 327*, this is a breaking sufficient in burglary; but entering by an open window, is not; or if a window be partly raised, but not sufficient to get the arm in, and the party open it further to undo the fastening, it is not a breaking. *R. v. Smith, Ry. & M. 178*. Where a window opens on hinges, merely opening it when it is not fastened, is not a breaking; but opening it where it is fastened merely by a nail, is. *R. v. Hall, R. & Ry. 335*. Entering by an open chimney, is a breaking; *R. v. Brice, R. & Ry. 450*. 1 *Hawk. c. 38, s. 6*; but if there be an open place in any other part of the house,—as if there be an aperture in a cellar window, merely for the purpose of admitting light, *R. v. Lewis, 2 Car. & P. 628*, or there be a hole in the roof of the house, *R. v. Spriggs, 1 M. & Rob. 357*, or if the outer door or window be open, 1 *Hawk. c. 38, s. 6*. 2 *East, P. C. 485*,—and the party enter by it, it is not a breaking sufficient to constitute burglary. Yet, although a man thus enter by an open outer door or window, or be other-

wise in the house without breaking, if he break an inner door, or unlock it, or open it by unlatching it, 1 *Hawk. c. 38, s. 6.* 1 *Hale*, 553, 554. *Johnson's case*, 2 *East, P. C.* 488. *Gray's case*, 1 *Str.* 481, for the purpose of entering an inner room, with a felonious intent, it will be a breaking sufficient to constitute burglary; but breaking open a trunk or box in the house, is not, 2 *East, P. C.* 488, and it has been doubted whether breaking open the door of a cupboard, though fixed to the freehold, is, the judges being equally divided upon the question; 2 *East, P. C.* 489; and Lord Hale doubts whether it would be burglary in a guest at an inn, opening his own door to commit a felony. 1 *Hale*, 554. Also it must be some part of the dwelling-house, or of an out-house connected with it, that must be broken; and therefore breaking open an area-gate, *R. v. Davis, R. & Ry.* 322, or breaking open a gate forming part of the outer wall of the curtilage, which opened merely into a yard, and not into any building, *R. v. Bennet et al., R. & Ry.* 289, is not a breaking in burglary.

A constructive breaking, is, where the burglar obtains an entry into the dwelling-house, by some trick or artifice. If he make an attack upon the house with intent to rob it, and upon the owner opening the door to drive him off, he enter, this in law is deemed a breaking. 1 *Hawk. c. 38, s. 7.* So, if by threats of violence he intimidate the owner, and induce him to open the door from fear of the consequences of a refusal, this in law is a breaking. 1 *Hale*, 553. 2 *East, P. C.* 486. *R. v. Swallow et al., 1 Russ.* 792. So, if he come to the house with intent to rob it, and knock at the door, pretending to have business with the owner, and is let in, this in law is a breaking. *Id. s. 8.* So, where persons, intending to rob a house, raise a hue and cry, and prevail on the constable to search the house, and thereby obtain an entrance, this in law is a breaking. *Id. s. 10.* So where a man, intending to rob a house, took lodgings in it, and having thus obtained an entrance, attacked the landlord and robbed him, this was holden to be burglary. *Id. s. 9.* So, where a woman, intending to rob a house, induced a boy who was in care of it to let her in, by promising him a pot of ale, and having thus obtained an entrance, she sent him for the ale, and during his absence she robbed the house and went off: this was holden to be burglary. *Hawkins's case*, 2 *East, P. C.* 485. So, if by agreement and confederacy between thieves and a servant in the house, the servant in the night time open the door and let the thieves in, this in law is a breaking; 1 *Hale*, 553. 2 *East, P. C.* 486. *Cornwall's case*, 2 *Str.* 881; but if the servant merely pretend to confederate with the thieves, for the purpose of having them taken, and communicate the design to the police and act under their direction, his afterwards opening the door and letting the thieves in, has been holden not to be

such a breaking as to constitute burglary. *R. v. Johnson & Jones, Car. & M.* 218.

And the breaking, whether actual or constructive, must be in the night time, that is to say, between nine o'clock in the evening and six in the morning. 1 *Vict. c.* 86, *s.* 4.

2. An entering into the dwelling-house. An entry of any part of the person within the house is sufficient, although the party be detected, and abandon his design, before he has had an opportunity of effecting the felony intended. 1 *Hawk. c.* 38, *s.* 11. Where a man in the night time broke a pane of glass in a shop window, and put his hand in, and took some watches and other things within his reach, this was holden to be burglary. *R. v. Gibbons, Fost.* 107. And where a sash window of a dwelling-house was fastened in the usual way, by a latch from the bottom of the upper sash to the top of the lower one, and there were inside shutters which were fastened; the prisoner broke a pane of glass in the upper sash of the window and introduced his hand within, with intention to undo the latch by which the window was fastened; and whilst he was cutting a hole in the shutter with a centrebit and before he had undone the latch of the window, he was seized: the judges held this to be a sufficient entry to constitute burglary. *R. v. Bayley et al., R. & R.* 341. *R. v. Perkes, 1 Car. & P.* 300. So, putting the hand within the door-way, though for the purpose of making a pass with a sword at some persons in the entry, was holden sufficient. 1 *Hale*, 553. So, where a shop window, within which there were watches and jewellery, was broken, by the prisoner's thrusting his finger through one of the panes, and the finger was seen on the other side: the judges held this to be a sufficient entry to constitute burglary. *R. v. Davis, R. & Ry.* 499. So, if the party put in any instrument, for the purpose of committing the felony with it,—as if he put a pistol within a window for the purpose of firing, or a hook to take any thing out, 1 *Hawk. c.* 38, *s.* 11; 3 *Inst.* 64, and according to some, if he fire a loaded gun at the house and the bullet enter it, 1 *Hawk. c.* 38, *s.* 41; but see 1 *Hale*, 555, it is a sufficient entry; but otherwise, if merely the instrument, with which he is effecting the breaking, enter it. 1 *Hawk. c.* 88, *s.* 12. *R. v. Rust & Ford, Ry. & M.* 183. So, where the prisoner had made an entry by getting in at the top of a chimney, and he was afterwards found in the chimney, a little above the mantel piece: the judges held that as the chimney was part of the dwelling, by lowering himself in it, he must be considered as having entered the dwelling-house. *R. v. Brice, R. & Ry.* 450. So, where the breaking is constructive, the entry of the party thereupon is of course sufficient entry to constitute burglary.

The entry, as well as the breaking, must be in the night

time, that is to say, between the hours of nine in the evening and six the next morning. 1 *Vict. c.* 86, *s.* 4. It is not necessary, however, that the entry should be at the same time as the breaking; if the breaking be done with intent to enter, and the entry made with intent to commit a felony, and both in the night time, it is sufficient, although a day or more intervene between the one and the other. Where it appeared that the prisoner took the glass out of a door on Friday night, with intent to enter the house, and afterwards on the Sunday night, before the glass was replaced, he entered by the aperture he had thus made: the judges held, that the breaking being originally with intent to enter, and the breaking and the entering being both in the night time, the offence amounted to burglary, notwithstanding the time that had elapsed between the one and the other. *R. v. Smith, R. & Ry.* 417.

3. That the house broken and entered, is a dwelling-house, that is to say, a house in which the occupier or his family usually sleep at night; for although they may live and take their meals in it in the day time, yet if they sleep elsewhere at night, it is not a dwelling in which burglary can be committed. *R. v. Martin et al., R. & R.* 108. So, a set of chambers in an inn of court or college, is a dwelling-house, if the occupier or any of his family sleep there. 1 *Hawk. c.* 38, *s.* 18; 2 *East, P.C.* 492. And if any part of the family sleep in it, it will be sufficient. Therefore, where the prosecutor had a house fronting the street, the back part communicating by a door with a public passage; immediately opposite in the passage were some buildings occupied by the prosecutor, one for a kitchen, another a coach house, and another a brew house, and over the brew house a servant boy of the prosecutor always slept: upon an indictment for a burglary in the brew house, stating it to be the dwelling-house of the prosecutor, the judges held that it could not be deemed a part of the dwelling-house in which the prosecutor himself actually dwelt, being separated from it by the passage, but ten of them held it to be a distinct dwelling-house of the prosecutor. *R. v. Westwood, R. & Ry.* 495. So, upon an indictment for a burglary in a shop, stating it to be the dwelling-house of the prosecutor, it appeared that the prosecutor, who formerly dwelt in the house with his family, had latterly dwelt elsewhere, without an intention of returning; he continued the business however at the shop, let some of the rooms in the house to lodgers, and his foreman with his wife and an apprentice dwelt in others; the foreman's wife was also the prosecutor's servant, employed in keeping the apartments clean, but all were paid weekly wages: the judges held that the house was in law the dwelling-house of the prosecutor, and the shop a part of it. *R. v. Gibbons & Kew, R. & Ry.* 442. So, where

upon an indictment for burglary, it appeared that the premises consisted of a counting-house on the ground floor, occupied by the prosecutors as brewers and bankers, and two rooms above, in which their cooper and his family lived; the contract between the prosecutors and their brewer was, that he should have these rooms to live in, with firing and certain weekly wages; there was a separate entrance to the upper rooms, and there was no communication between them and the counting-house, except by a trap door, which however was never used: the counting-house being broken open, the judges held it to be properly described as the dwelling-house of the prosecutors. *R. v. Stock et al., R. & Ry.* 185. But, where the prosecutor, an upholsterer, and his family, left the house in which he had resided with his family, without an intent of returning to live in it, and took a dwelling-house elsewhere, but still retained the former house as a warehouse and workshop; and two women, employed by him as work women in his business, and not as domestic servants, slept there to take care of the house, but did not have their meals there, or use the house for any other purpose than sleeping in it as a security to the house: the judges held that this was not properly described as a dwelling-house of the prosecutor. *R. v. Flanagan, R. & Ry.* 187. So, a servant put to sleep in a barn, for the temporary purpose of watching against thieves, *Brown's case, 2 East, P. C.* 497, or a porter lying in a warehouse, for the temporary purpose of watching goods, *R. v. Smith, 2 East, P. C.* 497, does not make the barn or warehouse a dwelling-house, which can be the subject of burglary. But where a coachman rented two rooms over his mistress's coach house, and he and his family dwelt in them, it was holden that they were well described as his dwelling-house in an indictment for burglary in them. *R. v. Turner, 2 East, P. C.* 492. However, the occasional absence of the prosecutor and his family from his dwelling-house, will not prevent it from being deemed such, *1 Hawk. c.* 98, *s.* 18. *R. v. Murry & Harris, 2 East, P. C.* 496, provided that, when absent, he have the intention of returning to it. *Nutbrown's case, Fost.* 76. But if he leave it, without an intention to return to it, it can no longer be deemed his dwelling-house. *Id.* So, if the tenant of a dwelling-house, quit it at the end of his term, it can no longer be deemed his dwelling-house, or the dwelling-house of his landlord, unless the latter go and dwell in it. *R. v. Davis alias Silk, 2 East, P. C.* 490. But where the occupier died, and his executor put servants into the house, paying them board wages, but did not go to reside there himself, and a burglary was committed in the house, the judges held that it might be deemed the dwelling-house of the executor. *R. v. Jones & Longman, 2 East. P. C.* 490. If a man however take a house, and before he

goes to live in it, and whilst it is under repair or preparing for him, it be broken, entered, and robbed, it cannot be deemed his dwelling-house, for he has never as yet dwelt in it; and of course the offender cannot be convicted of burglary. *R. v. Lyons & Miller*, 2 East, P. C. 497. *Hallard's case*, 2 East, P. C. 498. *Fuller's case*, Id. *Harris's case*, Id. The law of burglary also has relation to permanent structures only, and not to booths or tents, or the like, although the owners may happen to dwell therein. 1 *Hale*, 537. 1 *Hawk. c.* 38, s. 35. But where a permanent building of mud and brick, built on the down at Weyhill, with wooden doors and windows that bolted on the inside, was rented by the prosecutor for the week of the fair, and used as a booth, but he and his wife slept in it; this being broken into by the prisoner in the night time, whilst it was thus occupied, Parke, J., (after consulting Littledale, J.) held that it was such a dwelling-house as might be the subject of burglary, and the prisoner was convicted. *R. v. Smith*, Mo. & R. 256.

All out-houses within the curtilage, (that is, the common fence including the dwelling-house and its offices) were formerly deemed parts of the dwelling-house; and if a burglary were committed in any of them, it was stated to be committed in the dwelling-house, or in an out-house parcel of the dwelling-house. But by stat. 7 & 8 G. 4, c. 29, s. 13, no building, although within the same curtilage with the dwelling-house and occupied therewith, shall be deemed to be part of such dwelling-house for the purpose of burglary, "unless there shall be a communication between such building and dwelling-house, either immediate, or by means of a covered and inclosed passage leading from one to the other." Where it appeared that the premises occupied by the prosecutor consisted of two rooms and a wash-house on the ground floor, and three bed rooms over them; the wash-house did not communicate with the other two rooms on the ground floor, the door opening into the yard, but the room over the wash-house communicated with the adjoining bed room; the prisoner having broken into the wash-house, was attempting to break the partition wall between that and the adjoining room on the ground floor, when he was detected: seven of the judges held this to be burglary; that the wash-house was a part of the dwelling-house, and that the above section extended only to buildings which are within the curtilage, but form no part of the dwelling-house: and five judges held that the wash-house was not part of the dwelling-house, and that the case came within the above section of the statute. *R. v. Burrowes*, R. & Ry. 274. If there be any doubt of the out-house or building broken or entered, being such as is here described, add to your indictment a count for breaking and entering a building within the curtilage, according to the form given, *post*, p. 344. A building,

however, to be within the meaning of the above section, must be occupied with the dwelling-house, and in the same right. Mrs. Richards let her dwelling-house to her son Josiah, and a warehouse, communicating internally with the dwelling-house, to Josiah and his younger brother, at a separate rent ; Josiah lived in the dwelling-house, and constantly used the communication between that and the warehouse ; both brothers carried on their joint business in the warehouse : the warehouse being broken and entered in the night time, the judges held that it could not be deemed part of the dwelling-house, as the dwelling-house was holden under a demise to Josiah alone, and he alone dwelt in it, and the warehouse was holden under a distinct demise to himself and his brother. *R. v. Jenkins et al.*, *R. & Ry.* 244.

4. That it was the dwelling-house of C. D., as mentioned in the indictment. There are a number of nice distinctions upon this subject, which formerly led to many acquittals, on grounds entirely beside the merits of the respective cases. But now the court at the trial may amend the indictment, if by mistake the house be stated to be the dwelling-house of C. D. instead of E. F., &c. *See ante*, p. 100. I may be excused therefore from giving the cases upon the subject at as great length as might otherwise be necessary. Where the prosecutor and his family are the sole occupants of the house, and in the prosecutor's own right as owner or tenant, it may well be described as his dwelling-house, even although he be but tenant at will. *R. v. Collett et al.*, *R. & R.* 498. If it be occupied by a married woman, though living separate from her husband, it must be described as the dwelling-house of her husband. *R. v. French*, *R. & Ry.* 491. *R. v. Wilford & Nibbs*, *R. & Ry.* 517. *Farr's case*, *Kel.* 43. In the case of chambers in an inn or court or a college, they are rightly stated to be the dwelling-house of the occupier, if he dwell in them. 2 *East*, *P. C.* 505. So, an out-house belonging to and connected with a dwelling-house, as mentioned, *ante*, p. 335, is described to be the dwelling-house of the person residing and dwelling in the dwelling-house to which it is attached ; unless it be let to another, and in that case it is described as the dwelling-house of the latter, if he actually dwell in it. In the case of the coachman who rented two rooms over a coach-house, in which he and his wife dwelt, it was holden that they were properly described as the dwelling-house of the coachman. *Turner's case*, *ante*, p. 334. If indeed he occupied them as servant only, then they must have been described as the dwelling-house of the master, whether they were connected with the house the master actually occupied (as described, *ante*, p. 335,) or not, in which latter case they would be deemed the separate dwelling-house of the master. *See Westwood's case*, *ante*, p. 333. Sometimes a

difficulty arises, in ascertaining whether a party dwells in and occupies a house in his own right, or as the servant of another. Where a warehouseman, with his family, lived in a dwelling-house upon the premises of his master, for which and for coals he paid his master a rent of 11*l.* a year ; the house alone was worth 20*l.* a year to let to an ordinary tenant, but the master let it to him at a much lower rent, being desirous that he should reside upon the premises for their security ; upon an indictment for burglary in the house, the judges held that this occupation of the warehouseman could not be deemed the occupation of the master, for the warehouseman stood in the character of tenant ; the master might have distrained upon him for his rent, and could not arbitrarily have removed him. *R. v. Jervis & Walker, Ry. & M. 7.* A workman was employed at 15*s.* a week wages, and a cottage free of rent and taxes for himself and his family to dwell in : upon an indictment for burglary in the cottage, the judge at the trial held that as the workman occupied the cottage for his own benefit and not for the use or benefit of his master, it was well described as the dwelling-house of the workman ; and upon a reference to the judges, they were of the same opinion. *R. v. Jobling, R. & Ry. 525 ; and see R. v. Margetts et al., 2 Leach, 930.* Where a toll-gate house, erected by the trustees of a turnpike, as and for the dwelling-house of the person who might be employed to collect the tolls at a particular gate, was broken and entered in the night time ; and upon an indictment for the burglary, it appeared that the trustees had let the tolls to Ward, and Ward had employed Ellis (at weekly wages, with the privilege of living in the toll-house in question) to collect them, and that Ellis dwelt in the house for that purpose : the indictment having described this as the dwelling-house of Ellis, the judges held the description to be correct ; for Ellis had the exclusive possession ; it was unconnected with any premises of Ward, and Ward did not appear to have any interest whatever in it. *R. v. Camfield et al., Ry. & M. 42.* If on the other hand it be occupied by servants only, the house should in general be described as the dwelling-house of the master. *R. v. Stack, R. & Ry. 185. R. v. Rawlins et al., 7 Car. & P. 150, 2 East, P. C. 500.* And therefore, where one Story had separate apartments in the house of the African company, as an officer of that company, and a burglary being committed in them, they were stated in the indictment to be the dwelling-house of Story : this was holden to be wrong, for Story, and others in similar situations, occupied their apartments as servants of the company ; the indictment should have stated the apartments to be the dwelling-house of the company, for, although as an aggregate corporate body, the company could not be said to dwell anywhere, yet they might have a mansion for the habitation

of their servants. *R. v. Hawkins*, 2 *East*, *P. C.* 501. *S. P. Picket's case and Maynard's case, Id.* So, an indictment for a burglary in apartments in the custom-house, would rightly describe them as the dwelling-house of the Queen. *R. v. Jordan*, 7 *Car. & P.* 432. But where the Norwich Union life office had their office of business in the lower part of a house, the upper part being appropriated for the residence of their secretary and his family, and a burglary being committed in the lower part, the house was described in the indictment as the dwelling-house of the secretary: the judges held that as the secretary and his family were the only persons who dwelt in the house, it was properly described as his dwelling-house, although it might have been described as that of the company. *R. v. Witt*, *Ry. & M.* 248.

If a man let a part of his house to lodgers, and he or any of his family continue to dwell in the other part,—if a burglary be committed in the house, whether in the part occupied by him or that occupied by the lodgers, the house must be described in the indictment as his dwelling house. *Kel.* 84. 2 *East*, *P. C.* 505. So, in the case of a guest at an inn, if his room be broken and entered in the night time, the indictment must describe it as the dwelling-house of the innkeeper. 1 *Hale*, 554, 557. 2 *East*, *P. C.* 502. *Prosser's case, Id.* In *R. v. Gibbons and Kew*, *ante*, p. 333, where a servant of the prosecutor dwelt in a part of the house, and the rest (excepting the shop) was let off to lodgers,—a burglary being committed in the shop, the judges held that it was properly described as the dwelling-house of the prosecutor. Where the prosecutor, (having a dwelling-house with a shop adjoining to it, with separate entrances from the street, but the shop having a back door into a passage in the house), let the shop to his son, who used it as a place of business only, and did not reside there: a burglary having been committed in the shop, the judges held that it was properly described in the indictment as the dwelling-house of the father. *R. v. Sefton*, *R. & Ry.* 202. But if he, his family or servants, do not dwell in that part reserved to himself, and that part be broken and entered, the offender cannot be convicted of burglary: it cannot be described as his dwelling-house, for he does not dwell in it; nor can it be described as the dwelling-house of his lodger, for it forms no part of his holding, he has not possession of it, or any interest in it. *R. v. Wilson* *R. & Ry.* 115. But if in such a case the burglary be in that part occupied by a lodger, it may be described as the lodger's dwelling-house. 2 *East*, *P. C.* 505. *Rogers's case, Id.* 506. Or, if the owner or lessee of a dwelling-house let the whole of it to lodgers, retaining no part of it for his or his family's dwelling, the part each lodger occupies and dwells in, is deemed in law to be the dwelling-house of such lodger, with relation to burglary,

whether the parts holden by the respective lodgers communicate with each other or not. *Carrel's case*, 2 *East*, P. C. 506. *Trapshaw's case*, *Id.* 1 *Leach*, 427. 1 *Hawk. c.* 38, s. 29. Where the owner of a house divided the shop in two by a partition, each having a door opening into the street, and let one of them and some rooms in the house to Choice, and the other with the remainder of the house to Ryan; at the end of each shop was a door, opening into a common passage, that led to one common staircase; Choice paid 100*l.* a year and the taxes, for his portion; Ryan 80*l.* a year for his; each had his separate family, separate kitchen, &c., but the rooms occupied by each opened on the common staircase above mentioned: upon an indictment for burglary, it appeared that the prisoner entered at the window of the common staircase, unlocked the door of Ryan's shop and entered it; and the judges held that the place was rightly described in the indictment as the dwelling-house of Ryan. *R. v. John Bailey*, *Ry. & M.* 23. So, if a man let off part of his dwelling-house, and retain and live in the rest, but sever the two parts so as to make them distinct tenements, having distinct entrances, and having no internal communication with each other,—then each tenement is considered in law the dwelling-house of the party who dwells in it, and must be described as such in an indictment for burglary. 2 *Hawk. c.* 38, s. 28. 2 *East*, P. C. 507. And see *R. v. Gibson*, *Id.* 508, *per cur.* So, where two partners had a house, and they divided it so as to have separate entrances and no internal communication, each part was holden to be the separate dwelling-house of the partner occupying it. *Jones's case*, 2 *East*, P. C. 504. 1 *Leach*, 607. But where the house of a partnership had not been divided, and one only of the partners with his family dwelt in it, but the clerks, shopmen, and servants of the firm, ninety-one in number, slept there also,—the judges held the house to be rightly described as the dwelling-house of the partners. *R. v. Athea*, *Ry. & M.* 329. The occupier may be named by the name he is usually known by: and where the house was described as the dwelling-house of Mary Johnson, and it appeared that her real name was Mary Davies, but that she had taken the house in the name of Johnson, and had been called and known by that name alone for the last five years,—the judges held that this fully warranted her being called Johnson in the indictment. *R. v. Norton*, *R. & Ry.* 510. If, however, there be any mistake in this respect, the judge at the trial may amend the indictment. 14 & 15 *Vict. c.* 100, s. 1; *ante*, p. 100.

5. That the house is situate, as described in the indictment. Where it appeared that the house was in the parish of A., but the out-house in which the burglary was committed was in

the parish of B., and the indictment described the house as being in the parish of B., the question whether this was a right local description of the house was reserved for the opinion of the judges: they however gave no opinion upon the point, but decided the case upon another ground. *R. v. Bennett et al.*, *R. & Ry.* 289. However, a mistake in this respect may be amended by the judge at the trial. 14 & 15 *Vict. c.* 100, s. 1, *ante*, p. 100.

6. The intent to commit the felony, as stated in the indictment. This is an essential ingredient in burglary, without which it would be merely a trespass. It is immaterial whether it be a felony at common law or by statute. 1 *Hawk. c.* 38, s. 38. In general the intent may be presumed from what the offender actually does after the breaking and entering; if he commit a felony, it may fairly be presumed that he entered for that purpose. Even the very fact of breaking and entering in the night time, raises a presumption that it is done with the intent of stealing. Where a man in the night time had entered a house by the chimney, and was found in it just above the mantel-piece; and when he found he was detected he ascended the chimney again and got out at the roof: the jury found him guilty of burglary with intent to steal, upon this evidence alone, and the judges confirmed the conviction. *R. v. Brice*, *R. & Ry.* 450. But this, like other presumptions, may be rebutted. Where persons were indicted for a burglary in the house of A., with intent to steal the goods of B., an excise officer, but it appeared that they broke in for the purpose of taking and restoring to the owner some tea which the excise officer had seized; the judges held that this did not support the indictment. *R. v. Knight et al.*, 2 *East, P. C.* 510. If a man break and enter the house of another in the night, with intent to beat him merely, and in beating him he kill him, it is not burglary: 1 *Hale*, 559, 561: here the presumption would be that he intended to commit murder; but the presumption is rebutted by showing what his real intent was at the time of the breaking and entry. Where a man was indicted for burglary with intent to kill a horse, and it appeared in evidence that the prisoner broke and entered a stable belonging to a dwelling-house, for the purpose of laming a horse that was kept there, in order to prevent him from running a race, and he accordingly effected his purpose by cutting the sinews of the fore leg, but the horse afterwards died of the wound: as wounding a horse was not at that time felony, the prisoner was acquitted of the burglary; but he was afterwards indicted for killing the horse, and convicted. *Dobbs's case*, 2 *East, P. C.* 513.

7. The larceny or other felony laid in the indictment. This

is proved as in the ordinary case of an indictment for the larceny or other felony. But it is not essential to a conviction for the burglary, that the larceny in this case should be proved, if you prove the intent *aliunde*. On the other hand, if you fail in proving the burglary, and prove the larceny, he may be convicted of the larceny and acquitted of the burglary; 2 *Hawk. c. 47, s. 11, ante*, p. 173; or if two be indicted, one may be convicted of the burglary, and the other of the larceny. *R. v. Butterworth et al., R. & Ry.* 520.

If you fail in proving the breaking and entering to have been in the night time, the prisoner may be convicted of house-breaking, under stat. 7 & 8 G. 4, c. 20, s. 12, *post*, p. 347, if a larceny in the house be proved. *R. v. Compton et al., 3 Car. & P.* 418. If you fail to prove the breaking and entry, the defendant may still be convicted of stealing in the dwelling-house, if the goods stolen be of the value of five pounds. *Hungerford's case, 2 East, P. C.* 513. And if you fail to prove the value to be five pounds, he may be convicted of a common larceny. *See ante*, p. 119.

As to principals in the first and second degrees: if several come to commit a burglary together, and some stand outside in the places adjacent to watch, whilst others break and enter and rob the house,—they are all guilty, 1 *Hawk. c. 38, s. 13*, the latter as principals in the first degree, the former as principals in the second. *See ante*, p. 12.

2. *Burglary and Personal Violence.*

Indictment.

Same as the last form, ante, p. 328, to the words “steal, take, and carry away; and that the said A. B. did then, in the said dwelling-house, feloniously and burglariously assault, stab, cut, and wound [“*assault with intent to murder any person therein, or shall stab, cut, wound, beat, or strike any such person*”] one E. F., in the said house then being: against the form of the statute in such case made and provided, and against the peace of our Lady the Queen, her crown and dignity.

Felony, death. 1 Vict. c. 86, s. 2. *Accessories before the fact, the same punishment.* Id. s. 6.

Evidence.

To maintain this indictment, the prosecutor must prove—

1. The burglary as in the last case, *ante*, p. 330.
2. The personal violence, as stated in the indictment. As to stabbing, cutting, or wounding, *see ante*, p. 260; and as to

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the intent to murder, *see ante*, p. 258. If you fail in proving this personal violence, the defendant may still be convicted of the burglary, &c. *See ante*, p. 341.

3. *Burglary, by Breaking out of a House.*

Indictment.

—— } The jurors for our Lady the Queen, upon their
to wit. { oath present, that A. B., on the —— day of ——,
in the year of our Lord ——, did enter the dwelling-house of
C. D., situate at ——, in the county of ——, with intent then
in the said dwelling-house feloniously to steal, take, and carry
away the goods and chattels of the said C. D. then there
being; and the said A. B. having so entered the said dwelling-
house with the intent aforesaid, afterwards on the day and
year aforesaid, about the hour of eleven in the night of the
same day, the said dwelling-house of the said C. D. feloniously
and burglariously did break, to get out of the same, and then
in the night time as aforesaid feloniously and burglariously
did break out of the same: against the form of the statute
in such case made and provided, and against the peace of our
Lady the Queen, her crown and dignity. [*If a larceny ap-
pear to have been committed, you may add another count
thus:*] And the jurors aforesaid upon their oath aforesaid do
further present, that the said A. B., on the day and year afore-
said, being in the dwelling-house of the said C. D., situate
at ——, in the county aforesaid, then in the said dwelling-
house feloniously did steal, take, and carry away one gold
watch of the value of five pounds of the goods and chattels of
the said C. D. in the said dwelling-house then being found; and
that the said A. B., so being then in the said last-mentioned
dwelling-house, and having so committed the felony last afore-
said in the said dwelling-house, afterwards, on the day and
year aforesaid, at the hour of eleven in the night of the same
day, the said dwelling-house of the said C. D. feloniously and
burglariously did break to get out of the same, and then in the
night time as aforesaid feloniously and burglariously did break
out of the same: against the form of the statute in such case
made and provided, and against the peace of our Lady the
Queen, her crown and dignity. [*The statute 7 & 8 G. 4,
c. 29, s. 11, defines both the offences in the above counts: "If
any person shall enter the dwelling-house of another, with
intent to commit felony, or being in such dwelling-house shall
commit felony, and shall in either case break out of the said
dwelling-house in the night time."*

*Declared to be burglary. 7 & 8 G. 4, c. 29, s. 11. See
ante, p. 329.*

Evidence.

To maintain the first count of this indictment, the prosecutor must prove—

1. The entry of the defendant into the dwelling-house ; or his being seen there, which of course will prove the entry.

2. The intent. This must be proved in the same manner as in the ordinary cases of burglary, from the words or acts of the prisoner. Indeed, the very fact of his being in the dwelling-house of another, in the night time, without authority or excuse, and breaking out of the house, is strong presumptive evidence that he entered it with intent to steal ; and the jury would be warranted in finding him guilty, unless he produce evidence sufficient to rebut the presumption. *See Brice's case, ante, p. 340.*

3. The breaking out of the house in the night time ; that is to say, that the prisoner broke the house, and by that means got out of it. The breaking is proved in the same way as in the ordinary case of burglary. *See ante, p. 330.* Where a man broke out of a house, by lifting the heavy flap door of a cellar, which had no fastening, but was kept down by its own weight, Bolland, B., held that this was not a sufficient breaking out of the house. *R. v. Lawrence and Weaver, 4 Car. & P. 231.* We have seen, however, that it would be a good breaking into the house, to constitute burglary. *See ante, p. 330.* But a fair distinction may be taken between the two cases : such a flap door is a good security to a house against any person breaking in ; but it is no more security against a person breaking out, than any other door having neither latch nor fastening, the opening of which would not be a breaking in or out. But raising the latch of a door, to get out, has been holden to be a breaking out, *R. v. Wheeldon, 8 Car. & P. 747,* in like manner as it is holden to be a breaking in. *See ante, p. 330.*

This breaking out must be proved to have been in the night time, that is, between nine o'clock in the evening and six in the morning. 1 *Vict. c. 86, s. 4.*

4. That the house is a dwelling-house ; *see ante, p. 333 ;* that C. D. was at the time of the burglary the occupier of it ; *see ante, p. 336 ;* and that it is situate, as described in the indictment : *see ante, p. 339 :—*in the same manner as upon an ordinary indictment for burglary.

To maintain the second count of the indictment, the prosecutor must prove—

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1. The larceny or other felony in the dwelling-house, as stated in the indictment, in the same manner as in ordinary cases upon an indictment for that felony alone.

2. That after committing the felony, the defendant broke out of the house, as under the first count, *supra*. If you fail to prove this, the defendant still may be convicted of a larceny in the dwelling-house, if the goods stolen be of the value of five pounds; or of a simple larceny if of a less value.

4. *Breaking and Entering a Building within the Curtilage, and Stealing.*

Indictment.

— { The jurors for our Lady the Queen, upon their
to wit. } oath present, that A. B., on the — day of —,
in the year of our Lord —, feloniously did break and enter
a certain building of C. D. situate at —, in the county of
—, (the said building being then within the curtilage of the
dwelling-house of the said C. D., there situate, and by the
said C. D. then occupied therewith, and there being then no
communication between the said building and the said dwell-
ing-house, either immediate or by means of any covered and
inclosed passage leading from the one to the other); and that the
said A. B. then in the said building feloniously did steal, take,
and carry away one gold watch [“*chattel, money, or valuable
security*”] of the value of five pounds, of the goods and
chattels of the said C. D., in the said building then being
found: against the form of the statute in such case made and
provided, and against the peace of our Lady the Queen, her
crown and dignity.

Felony; 7 & 8 G. 4, c. 29, s. 14; *transportation for not more than fifteen years, nor less than ten;—or imprisonment, with or without hard labour, for not more than three years.* 1 Vict. c. 90, s. 2. *Accessories before the fact, the same punishment*; 11 & 12 Vict. c. 46, s. 1, ante, p. 16; *accessories after the fact (not being receivers of the stolen property) by imprisonment, with or without hard labour, for not more than two years.* 7 & 8 G. 4, c. 29, ss. 6, 4.

Evidence.

To maintain this indictment, the prosecutor must prove—

1. The breaking and entry, as in burglary; *see ante*, pp. 330, 332; except that it is immaterial whether it was in the night or in the day.

2. That the building is within the curtilage of the dwelling-house. In the first place, it is clear that no building which has a communication with the dwelling-house, either immediate (that is, by a door leading immediately into the dwelling-house), or by means of any covered or inclosed passage, leading from one to the other, is a building within the meaning of this indictment. 7 & 8 G. 4, c. 29, s. 14. Also buildings clearly within the curtilage, and not communicating thus with the dwelling-house, if they be let by the occupier of the latter to a third person, are not buildings within the meaning of this indictment; *see ante*, p. 336; the buildings here meant, are the out-houses actually occupied with the dwelling-house, and within its curtilage, but not communicating therewith as above-mentioned. Where upon a trial for this offence, it appeared that the building broken into was situate in the fold-yard of the prosecutor's farm, in which were all the farm buildings, that the back door of the dwelling-house opened into what was called the pump-yard, which was separated from the fold-yard by a wall four feet high, in which there was a gate, and there was also a gate in the fold-yard opening into the highway: it was objected that the building was not within the curtilage of the dwelling-house, inasmuch as the pump-yard intervened between them; but Wightman, J., after conferring with Erskine, J., held that it was a building within the curtilage. *R. v. Gilbert et al.*, 1 Car. & K. 84. Before this statute, 7 & 8 G. 4, c. 29, when out-houses within the curtilage were deemed parcel of the dwelling-house, with respect to burglary, whether they communicated with the dwelling-house in the manner here mentioned or not,—it often became a question whether an out-house particularly situated was within the curtilage of the dwelling-house. Hawkins lays it down, that all out-buildings, as barns, stables, dairy-houses, &c., adjoining to a house, are looked upon as part thereof, and consequently burglary might be committed in them; but that if they stood at any distance from the house, it had not been usual to proceed against offences therein as burglaries. 1 *Hawk. c. 38, ss. 21, 22*. And it had been decided that an out-house, occupied by the prosecutor with his dwelling-house, but separated therefrom by a passage eight feet wide, and not connected with the dwelling-house by any fence inclosing both, was not a place in which a burglary could be committed. *R. v. Garland*, 1 *Hawk. c. 38, s. 23*; and *see R. v. Westwood, ante*, p. 333, *S. P.* A bake-house, eight or nine yards distant from the dwelling-house, but connected with it by means of a paling, was holden to be the subject of burglary. *Castle's case*, 1 *Hale*, 558. So, it was holden that a burglary might be committed in a shop adjoining the dwelling-house, not having any internal communication with it, and the doors of both opening on the street, there being a small court-

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yard before them which included both the house and shop. *R. v. Gibson et al.*, 1 *Leach*, 357. 2 *East*, P. C. 508. 1 *Hawk. c.* 38, s. 25. Where the prosecutor's premises consisted of his dwelling-house and his warehouse adjoining, both opening into the street, and having no internal communication; but there was a yard at the back, which inclosed them both, and each had a back door opening upon this yard: the warehouse having been broken and entered, the judges held that it was rightly described in the indictment as the dwelling-house of the prosecutor. *R. v. Lithgo*, R. & Ry. 857. And the same was decided as to a range of workshops adjoining the dwelling-house, all opening into the street, but all having doors at the back opening into a yard belonging to the dwelling-house. *R. v. Chalking et al.*, R. & Ry. 334. So, where the dwelling-house and warehouse of the prosecutor had separate entrances from the street, and each had a back door opening into a yard belonging to the prosecutor, this yard was inclosed by the house and other buildings of the prosecutor, and by a wall, and gates which were closed and fastened at night; the warehouse and dwelling-house were within the same range of buildings, but between them was another dwelling-house, opening into the yard, which was formerly part of the prosecutor's dwelling-house, but which he had separated from it, and let to a person who occupied it, together with some easements in the yard, as his yearly tenant: the warehouse having been broken and entered, the judges held it to be part of the dwelling-house; it was so before the division of the houses, and they thought it remained so after it. *R. v. Walters et al.*, Ry. & M. 13.

As this indictment states that there is no communication between the said building and the said dwelling-house, either immediate or by means of any covered and inclosed passage leading from the one to the other,—the prosecutor should be prepared to prove it. And therefore if there be a doubt whether the building in question may not be deemed such as is the subject of burglary or house-breaking, it may be prudent to add a count for it; for otherwise the defendant probably would be liable to be convicted only of a simple larceny.

3. The larceny in the building, in the same manner as in ordinary cases. The value is immaterial.

4. That the building is locally situated as described in the indictment, in the same manner as in burglary. *See ante*, p. 339. But if there be any mistake in this respect, the indictment may be amended at the trial. *See ante*, p. 100.

5. Housebreaking.

Indictment.

— } The jurors for our Lady the Queen, upon their
to wit. } oath present, that A. B., on the — day of —,
in the year of our Lord —, feloniously did break and enter
the dwelling-house of C. D., situate at —, in the county of
—, and then in the said dwelling-house feloniously did steal,
take, and carry away certain money of the said C. D., and one
cloth coat, and one linen shirt, of the goods and chattels of
the said C. D., [*“chattels, money, or valuable security,”*]
in the said dwelling-house then being found: against the form
of the statute in such case made and provided, and against the
peace of our Lady the Queen, her crown and dignity.

Felony; 7 & 8 G. 4, c. 29, s. 12; *transportation for not more than fifteen years, nor less than ten;—or imprisonment, with or without hard labour, for not more than three years.* 1 Vict. c. 90, s. 1. *As to the punishment of accessories before or after the fact*, see ante, pp. 16, 19. *As to costs*, see ante, p. 186; *costs of apprehension*, see ante, p. 189.

Evidence.

To maintain this indictment, the prosecutor must prove—

1. The breaking and entering, as in burglary; *see ante*, pp. 330, 332; except that it is not necessary that it should be in the night time. But if it turn out in evidence that the breaking or entering was after the hour of nine at night, or before six in the morning, as in burglary, still it should seem that the defendant may be convicted; for the words of the statute on which the indictment is framed, are, “If any person shall break and enter any dwelling-house, and steal therein,” &c., without saying in the night or in the day. Where one of two prisoners never entered the house, but stood outside whilst he sent the other to break and enter it, and to steal some money from a particular place to which he directed him: the judges held that he might be indicted for breaking and entering the house, as principal in the first degree. *R. v. Byford & Robinson, R. & Ry.* 521. *See ante*, pp. 12, 13.

2. That the house broken was a dwelling-house or out-house parcel of it, as in burglary. *See ante*, p. 333. And by stat. 7 & 8 G. 4, c. 29, s. 13, no building, although within the same curtilage with the dwelling-house, and occupied therewith, shall be deemed part of such dwelling-house for the purpose of

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this offence, unless there shall be a communication between such building and dwelling-house, either immediate or by means of a covered and inclosed passage leading from the one to the other.

3. That the house is in the occupation of C. D., the prosecutor, as in burglary; *see ante*, p. 336; and is situate as described in the indictment. *See ante*, p. 339.

4. The larceny, as in ordinary cases; the value of the thing stolen is immaterial. Where it appeared that the prisoner, after breaking and entering the house, took two half-sovereigns from a bureau in one of the rooms, but being immediately detected, he threw them under the grate in that room: Park, J., held that this was a sufficient asportation, to constitute a stealing within this clause of the statute. *R. v. Amier*, 6 Car. & P. 344.

Verdict.] If you fail to prove a breaking and entering, the defendant may still be found guilty of stealing in the dwelling-house, if the thing stolen be stated and proved to be of the value of 5*l.* or upwards, or of simple larceny, if less. Or if you fail to prove the house to be a dwelling-house or parcel thereof, as in burglary, the defendant may be convicted of simple larceny. *See ante*, p. 118. If you prove the breaking and entering, but fail to prove the larceny, the defendant may be convicted of an attempt to commit the offence charged. 14 & 15 Vict. c. 100, s. 9, *ante*, p. 124. *See R. v. Lawes et al.*, 1 Car. & K. 62.

6. *Breaking and Entering a Shop, Warehouse, or Counting-house, and Stealing.*

Indictment.

— } The jurors for our Lady the Queen, upon their
to wit. } oath present, that A. B., on the — day of —,
in the year of our Lord —, feloniously did break and enter
the shop [“*shop, warehouse, or counting-house*”] of C. D.,
situate at —, in the county of —, and then in the said
shop feloniously did steal, take, and carry away certain money
of the said C. D., and one cloth coat, and one linen shirt, of
the goods and chattels of the said C. D. [“*chattel, money, or
valuable security*”], in the said shop then being found:
against the form of the statute in such case made and provided,
and against the peace of our Lady the Queen, her crown and
dignity.

Felony; 7 & 8 G. 4, c. 29, s. 15; *transportation for not
more than fifteen years, nor less than ten; or imprisonment,*

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with or without hard labour, for not more than three years. 1 Vict. c. 90, s. 2. As to the punishment of accessories before and after the fact, see ante, pp. 16, 19.

Evidence.

To maintain this indictment, the prosecutor must prove—

1. A breaking and entering of the shop, in like manner as in burglary; *see ante*, pp. 330, 332; except that it need not be in the night time. If, however, it turn out in evidence that the offence was committed in the night time, still it should seem that the defendant may be convicted, even although it appear that the shop, warehouse, or counting-house was parcel of the prosecutor's dwelling-house; for the words of the statute are—"If any person shall break and enter" (without saying in the day or in the night) "any shop, warehouse, or counting-house" (without saying whether parcel of the dwelling-house or not) "and steal therein," &c. But where the evidence appears from the depositions clearly to prove burglary or housebreaking, the indictment properly should be framed accordingly.

2. That the shop, warehouse, or counting-house was then in the occupation of the prosecutor. *See ante*, p. 336. What is a shop or counting-house has in some cases been a matter of doubt. Where a blacksmith, who also dealt in coals, had a room beyond his workshop for holding his coals, and persons wishing to purchase went to this room for the purpose; a person being indicted for stealing coals from this place, as from a shop, Alderson, B., held that this was not a shop within the meaning of the statute; a workshop, such as a blacksmith's or carpenter's shop, was not within the act. *R. v. Saunders*, 9 *Car. & P.* 79. But, in a subsequent case, where a blacksmith's workshop alone, used for no other purpose, and not parcel of a dwelling-house, was broken open and robbed, Lord Denman, C. J., held it to be within the Act. *R. v. Carter*, 1 *Car. & K.* 173. Where a prisoner was indicted for breaking and entering a counting-house, and stealing a quantity of copper coins therein, it appeared that the place he broke and entered was a part of some extensive chemical works, called the machine-house, where all goods were weighed, and the weights entered in a book kept there by one of the prosecutor's servants, that an account of the men's time and the amount of their wages was taken there and entered in a book brought on each occasion there for the purpose, and then taken back to a room called the office, where the general books and accounts of the concern were

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kept: the prisoner being convicted, and the question whether this was a counting-house within the meaning of the Act being reserved for the court of appeal, Lord Campbell, C. J., said that the only question that could be submitted to the judges was, whether there was evidence that the building was a counting-house, and he thought there was abundant evidence for the purpose; and the other judges concurred. *R. v. Potter*, 20 *Law J.* 170, m.

3. The local situation of the shop, &c., as stated in the indictment. Where the prisoner was indicted for breaking and entering a warehouse in the parish of St. Peter the Great, in the county of Worcester, but the evidence was, that the parish was partly in the county of Worcester, and partly in the county of the city of Worcester: it was objected that this was a variance, and that the indictment should have stated the warehouse to be in that part of the parish of St. Peter which was in the county of Worcester; Patteson, J., held that to be so, and the prisoner was convicted of the simple larceny only. *R. v. Brookes et al.*, *Car. & M.* 543. But now such a mistake as this may be rectified by amending the indictment. See *stat. 14 & 15 Vict. c. 100, s. 1, ante*, p. 100.

4. The larceny in the shop, as in ordinary cases. The value is immaterial.

7. *Breaking and Entering a Church or Chapel, and Stealing.*

Indictment.

— } The jurors for our Lady the Queen, upon their
to wit. } oath present, that A. B., on the — day of —,
in the year of our Lord —, feloniously did break and enter
the church [“*any church or chapel*”] of — [name it],
situate at —, in the county of —, and then in the said
church feloniously did steal, take, and carry away one silver
cup and one book [“*any chattel*”] then therein found, of the
chattels of C. D. and E. F., churchwardens of the said parish:
against the form of the statute in such case made and pro-
vided, and against the peace of our Lady the Queen, her crown
and dignity. [If it be doubtful whether the defendant broke
in, or broke out, you may add another count, thus:.] And
the jurors aforesaid, upon their oath aforesaid, do further
present, that the said A. B., on the day and year aforesaid,
being in the church of —, situate at —, in the county
aforesaid, then in the said church feloniously did steal, take,
and carry away one silver cup and one book, of the chattels

of the said C. D. and E. F., churchwardens of the said parish as aforesaid, in the said church then being; and that the said A. B., so being then in the said last mentioned church, and having so stolen the chattels last aforesaid in the said church, afterwards on the day and year aforesaid, the said last mentioned church feloniously did break to get out of the same, and then feloniously did break out of the same: against the form of the statute in such case made and provided, and against the peace of our Lady the Queen, her crown and dignity. [*Counts may be added, varying the statement as to the ownership of the property, if necessary.*]

Felony; 7 & 8 G. 4, c. 29, s. 10; transportation for life, or not less than seven years;—or imprisonment, with or without hard labour, for not more than three years, and solitary confinement during any portion of the imprisonment. 6 W. 4, c. 4. As to accessories before and after the fact, see ante, pp. 16, 19.

Evidence.

To maintain the first count of this indictment, the prosecutor must prove—

1. The breaking and entering, as in burglary; *see ante*, pp. 330, 332; except that it is immaterial whether it be in the night or in the day. The local situation of the church or chapel must also be proved. Where the vestry was broken and entered, and it appeared that it was formerly the church porch, but upon alterations being made in the church, it was made into a vestry, having one door opening into the church, and another into the churchyard, but it was used merely by the clergyman for robing, and for holding the sacramental plate: this was holden to be part of the church, Coleridge, J., saying that it was just as much a part of the church as the nave. *R. v. Evans et al.*, *Car. & M.* 298. So, where the tower of a church was broken and entered, and it appeared that it was immediately connected with the body of the church, having a door opening into it, and no outer door: it was holden to be part of the church. *R. v. Wheeler*, 3 *Car. & P.* 585. As to chapels, the Act extends only to chapels of the church of England, and not to those of dissenters. Where persons were indicted for breaking and entering a chapel, and it appeared from the evidence that it was a dissenting chapel, Gaselee, J., and Vaughan, B., held that this section of the statute did not extend to it; that in stat. 7 & 8 G. 4, c. 30, s. 2, relating to the burning of churches and chapels, where the legislature meant to protect the chapels of dissenters, they mentioned them expressly. *R. v. Warren and Spencer*,

352 *Breaking a Church or Chapel, and Stealing.*

6 *Car. & P.* 335, n. *R. v. Nixon and Scroop*, 7 *Car. & P.* 442, S. P.

2. The larceny, as in ordinary circumstances. Where the stealing is in a parish church, the goods stolen must be described as the property of the churchwardens, or parishioners, or of the rector. The goods of the church, and which the churchwardens are bound to provide for the parishioners, are the property of the parishioners, but are deemed to be vested in the churchwardens as their representatives; so that they may be stated to be the "chattels" either of the churchwardens or of the parishioners. The rector also, as the freehold of the church is in him, and he has the occupation of it, has a special property *quasi* as bailee in all goods in the church, whether goods of the church, or of individuals of the congregation, and they may be laid to be the "chattels" of the rector. Where in an indictment for breaking and entering a church, and stealing an ancient poor-box fixed in it, with the money contained in it, one count stated the money to be the property of C. D. and others, the second count as the property of E. F. and others, and a third count stated it to be the property of G. H. and others; C. D. was one of the churchwardens, E. F. was the rector, and G. H. was one of the parishioners, but they were not called so in the indictment; this was objected to, and upon the prisoners being convicted, the point was reserved for the opinion of the judges; and the case being afterwards argued before them, they held the conviction to be right. *R. v. Wortley and Allen*, 2 *Car. & K.* 283. Where the stealing is from a chapel, the goods may be laid as the "chattels" of the owner of the chapel, or, if it be vested in trustees, then as the "chattels" of one of the trustees (naming him) and others; or if it be the property of an individual of the congregation, it may be stated to be his property, as in ordinary cases of larceny. But if any objection be made for variance between the statement in the indictment and proof in this respect, the indictment may now be amended by stat. 14 & 15 Vict. c. 100, s. 1. *See ante*, p. 100. A fixture, however, is not a "chattel" within the meaning of the act. *R. v. Baker*, 13 *Shaw's J. P.* 429. *R. v. Nixon*, 7 *Car. & P.* 442.

To maintain the second count of the indictment the prosecutor must prove—

1. The larceny in the church or chapel, as above.

2. The breaking out, as *ante*, p. 343; and the local situation of the church or chapel, as in burglary. *See ante*, p. 339.

8. *Being armed, &c., with intent to break and enter a Dwelling-house, &c.*

Indictment.

— } The jurors for our Lady the Queen, upon their
to wit. } oath present, that A. B., on the — day of —,
in the year of our Lord —, was found by night, to wit, at
the hour of eleven in the night of the same day [armed with
a certain dangerous and offensive weapon and instrument, to
wit, a —, with intent then to break and enter into a dwell-
ing-house, and to commit a felony therein :—*Or*, having then
in his possession, without lawful excuse, twenty picklock keys,
and divers implements of housebreaking, to wit, one crow,
one jack, and one bit :—*Or*, having his face blackened and
being otherwise disguised, with intent to commit a felony :—
Or, in the dwelling house of one C. D., situate at —, in the
county of —, with intent to commit a felony therein :]
against the form of the statute in such case made and pro-
vided, and against the peace of our Lady the Queen, her crown
and dignity.

*Misdemeanor ; imprisonment, with or without hard la-
bour, for not more than three years. 14 & 15 Vict. c. 19, s. 1.
If committed after a previous conviction for felony, or for
such misdemeanor,—transportation for not more than ten
nor less than seven years,—or imprisonment with or without
hard labour, for not more than three years ; and in the in-
dictment, in stating the former conviction, it shall be suffi-
cient to state that the defendant was at a certain time and
place, convicted of felony, or of a misdemeanor against
“ the Act for the better prevention of offences, 1851,” as
the case may be, without otherwise describing the previous
felony or misdemeanor. Id. s. 2.*

Evidence.

There are four offences defined by stat. 14 & 15 Vict. c. 19, s. 1. They are all set out in the above form, so that an indictment may be drawn from it for any one of them. The evidence will consist of proof of the facts stated in the indictment, and that the defendant was found, under the circumstances there stated, in the night time, (which time is the same as in burglary, 14 & 15 Vict. c. 19, s. 13,) namely, between the hour of nine at night and six in the morning. *See ante*, p. 328.

Upon an indictment for one of these offences after a former conviction, the former conviction may be proved by a certifi-

cate, containing the substance and effect only (omitting the formal part) of the former indictment and conviction, purporting to be signed by the clerk of the court or other officer having the custody of the record, or his deputy ; and proof of identity. 14 & 15 Vict. c. 19, s. 2.

As to stealing from a dwelling-house, see *post*, tit. "*Larceny*." And as to setting fire to a dwelling-house, &c., see *post*, tit. "*Malicious Injuries*."

SECTION IV.

Offences against the Property of Individuals, by Stealing, Embezzling, Cheating, or Receiving.

The offences I mean to include in this section, I shall treat of under the following heads :

1. *Simple Larceny at Common Law.*
2. *Larceny of Valuable Securities.*
3. *Stealing Cattle or other Animals.*
4. *Stealing Things fixed to the Freehold.*
5. *Stealing from the Person.*
6. *Stealing in a Dwelling-house or Building.*
7. *Stealing from Ships, Wharfs, &c.*
8. *Stealing by Tenants or Lodgers.*
9. *Stealing by Clerks or Servants.*
10. *Embezzlement.*
11. *Cheating or defrauding.*
12. *Receiving Goods stolen, &c.*
13. *Piracy, &c.*

1. *Simple Larceny at Common Law.*

Indictment.

— } The jurors for our Lady the Queen, upon their
to wit. } oath present, that A. B., on the — day of —,
in the year of our Lord —, feloniously did steal, take,
and carry away [certain money of C. D., and one gold
watch, two cloth coats, and five linen shirts, of the goods
and chattels of the said C. D.] : against the peace of our Lady
the Queen, her crown and dignity. [*As to other counts,*
see post, p. 360.]

Felony; imprisonment [with or without hard labour, and the imprisonment solitary for the whole or any portion of the time, s. 4,] for not more than two years, and if a male, to be once, twice, or thrice publicly or privately whipped, if the court shall think fit. 7 & 8 G. 4, c. 29, s. 3. By this Act the offender might be transported, or imprisoned, &c. But so much of the Act as related to transportation, was repealed by stat. 12 Vict. c. 11, s. 1, except with respect to such offenders as, having been twice summarily convicted of offences against 7 & 8 G. 4, c. 29, or against the statute for the punishment of juvenile offenders (ante, p. 59), should afterwards commit the offence of simple larceny. 12 Vict. c. 11, s. 3.

Indictment.] As to the venue, see ante, p. 69. The indictment must charge that the defendant took and carried away the goods, or, in horse stealing, that he took and led away the horse, or, in an indictment for stealing cattle or sheep, that he took and drove them away. 1 Hale, 504, 508. 2 Hale, 184. 1 Hawk. c. 33, s. 1. And it must state that it was done feloniously, for otherwise the taking described would be a mere trespass; no other word is equivalent to it. 2 East, P. C. 778.

The goods must be described with sufficient certainty in the indictment, in order to show that they are such things as are the subject of larceny. Where a person was indicted for stealing "three eggs of the value of two pence," Tindal, C. J., held the indictment bad, for not stating what sort of eggs they were; for all that appeared in the indictment, they might be adders' eggs or other eggs, which could not be the subject of larceny. R. v. Cox, 1 Car. & K. 494. In an indictment for a larceny of live animals, it is not necessary to state them to be alive, because the law will presume them to be so, unless the contrary be stated; but as to dead animals, it was formerly holden that the indictment should in all cases describe them as being so, otherwise it would be a misdescription, and fatal. And therefore, where upon an indictment for stealing two turkies, it appeared that the turkies were dead when they were stolen: Hullock, B., held this to be a fatal variance; for "turkies" mean live turkies. R. v. Halloway, 1 Car. & P. 128. And the rule is so still, with respect to animals, the stealing of which is made additionally penal by statute, such as horses, oxen, cows, sheep; if they be dead when stolen, it must be so stated in the indictment; for upon an indictment for stealing a horse, ox, or sheep, you cannot give in evidence the stealing of a dead one, for that is only simple larceny at common law. But in all cases of stealing animals, where it is the same offence whether they are dead or alive, such as poultry, &c.,

which are the subject of larceny at common law, it is no longer deemed necessary to state that they were dead at the time they were stolen. Where a man was indicted for receiving a "lamb," knowing it to have been stolen, it appeared that the lamb had been killed at the time he received it, and it was objected that it was misdescribed in the indictment: upon the point being reserved for the opinion of the judges, they held that the objection ought not to prevail; for this being a case of receiving, it was immaterial to the prisoner's offence whether the lamb was alive or dead; in either case his offence and punishment were the same. *R. v. Puckering*, Ry. & M. 242. Where a man was indicted for stealing "one sheep," and it appeared that the animal was between nine and twelve months old, and some of the witnesses called it a sheep, some a lamb, but the jury said that in common parlance it was called a lamb: the prisoner being convicted, the judges held the conviction to be right, as the word "sheep" being general, was applicable to one of that age, whatever in common parlance it might be called. *R. v. Spicer*, 1 Car. & K. 699. Where a man was indicted for stealing "one ham, of the value of 10s., of the goods and chattels of Thomas Keighway," and it was objected that the description was not sufficient, as it might be the ham of some wild animal, which would not be the subject of larceny: the judges, however, held it to be sufficient, for even if it were the ham of a wild animal, it might be of value, and the subject of larceny, the rule as to animals *feræ naturæ* applying only to the live animal. *R. v. Gallears*, 2 Car. & K. 981, 19 Law J. 13, m. So where the prisoner was indicted for receiving "twenty-eight pounds of tin," and it appeared that what he had received were two lumps of tin, called in the trade ingots; and it was objected that they ought to have been so called in the indictment: but Coleridge, J., held that they were properly described as so many pounds weight of tin; if the ingots were some article which in ordinary parlance was called by a particular name of its own, it would be improper to call it by the name of the material of which it was composed; in speaking of a piece of cloth, you could not call it so many pounds weight of wool; in speaking of sovereigns, you could not call them so many ounces of gold; but here, this is the material itself, and is properly described as so many pounds weight of tin; so, in larceny of a bar of iron, it would be properly described as so many pounds weight of iron. *R. v. Mansfield*, Car. & M. 140. But where a man was indicted in the county of Hereford for stealing a brass furnace in that county, and it appeared that he stole it in Radnorshire, broke it in pieces, and brought it into Herefordshire, where he was apprehended: Hullock, B., held that the evidence

did not support the indictment, for he never had the brass furnace in Herefordshire, but merely pieces of brass. R. v. Halloway, 1 Car. & P. 127.

But by stat. 14 & 15 Vict. c. 100, s. 5, in any indictment for stealing any instrument, it shall be sufficient to describe it by any name or designation by which it may be usually known, or by the purport of it, without setting out any copy, or otherwise describing the same, or the value thereof.

And by sect. 18, in any indictment in which it shall be necessary to make any averment as to any money, or any note of the Bank of England, or any other bank, it shall be sufficient to describe such money or bank note simply as money, without specifying any particular coin or bank note; and such allegation, so far as regards the description of the property, shall be sustained by proof of any amount of coin, or of any bank note, although the particular species of coin of which such amount was composed, or the particular nature of the bank note, shall not be proved.

And by sect. 24, no indictment shall be deemed insufficient, for want of the statement of the value or price of any matter or thing, in any case where the value or price is not of the essence of the offence. Since the distinction between grand and petty larceny was abolished by stat. 7 & 8 G. 4, c. 29, s. 2, it seems to have been no longer necessary to insert the value of the articles stolen in an indictment for larceny, except for stealing to the value of 5l. in a dwelling-house. It was said, indeed, by some, to be necessary to show that the thing was of some value; but this was sufficiently shown, by stating it to be of the goods and chattels of the prosecutor. As it can be of no use, therefore, in any case to insert it where the value or price is not of the essence of the offence, and as the 24th sect. of stat. 14 & 15 Vict. c. 100, above mentioned, sanctions its omission in all other cases, I have in practice omitted to insert it, except in the single case above mentioned.

The thing stolen must be described as the property either of the actual owner,—or of a person having a special property as bailee, and from whose possession it has been taken. If the things stolen be personal chattels, they are described as the “goods and chattels” of C. D.; if money, as the “money” of C. D.; if they be choses in action, or things fixed to the freehold, which are not personal chattels, and were not the subject of larceny at common law, they are described as the “property” of C. D. Where a man was indicted for stealing “two shillings, of the goods and chattels” of C. D., and this being objected to, the point was reserved for the opinion of the criminal appeal court: the judges held that the words “of the goods and chattels”

might be rejected as surplusage, and then it would stand "two shillings of C. D.," which was a sufficient allegation that they were his property. *R. v. Radley*, 2 Car. & K. 974. Where the goods are in the possession of a bailee at the time they are stolen, they may be described as the goods of the owner, or of the bailee. They may be described as the goods of the owner, although he never have had actual, but merely a constructive possession of them: and, therefore, where bank notes, the property of one Nash, but which had never been in his possession, being by his orders sent by an agent of his in the Isle of Wight to his agent in London, and by the latter to an agent of Nash's at Worcester, were stolen from the carrier, and they were described in the indictment as the property of Nash: the judges held that they were properly described as Nash's property. *R. v. Remnant*, R. & Ry. 136. Or they may be laid to be the property of the bailee, as for instance, the carrier in *Remnant's* case, from whom the notes were in fact stolen. So linen delivered to a laundress to wash, *Packer's* case, 2 East, P. C. 653, cattle sent to an agister to agist, *Woodward's* case, 2 East, P. C. 653, or goods given to the driver of a stage-coach to carry, *R. v. Deakin and Smith*, Id., may be described as the property of the bailee, or of the owner. And if a man steal his own goods from a bailee, they must be laid to be the property of the bailee. 1 Hale, 513, 2 East, P. C. 654. If goods be stolen whilst in the custody of the sheriff under an execution, they may still be described as the property of the defendant, for they are his until sale. *R. v. Eastall*, 2 Russ. 92. Or they might be stated to be the goods of the sheriff. But if property be stolen from the owner's servant, they must be laid to be the property of the owner; for the servant is not a bailee. 2 East, P. C. 652, but see *R. v. Ruddick*, 8 Car. & P. 237. But if a man part with the right to immediate possession, so as not to be in a situation to maintain trespass, as if he let furniture with lodgings to a lodger, then if any of the furniture be stolen, it cannot be laid as the property of the owner, but must be described as the property of the lodger. *R. v. Belstead*, R. & Ry. 411. *R. v. Brunswick*, Ry. & M. 27. The clothes of a child of tender years, supplied by the father, must be laid to be the property of the father; of a child grown up, the property of the father or of the child, and more properly the latter. *R. v. Hughes*, Car. & M. 593. 2 East, P. C. 654. Goods, &c. in the possession of a wife, must be laid to be the property of the husband, 1 Hale, 513, even although she held them as bailee for another. *R. v. Roberts*, 7 Car. & P. 485. If the owner be dead at the time the goods are stolen, they must be stated to be the property of his executor, if there be one, or of the administrator, if at that time there be one, or if

neither, they must be laid to be the property of the bishop of the diocese; *R. v. George and Ann Smith*, 7 Car. & P. 147. *R. v. Tippin*, Car. & M. 545; and if the shroud be stolen from the corpse, it may be laid to be the property of the person, whose property it was at the time it was put on. 1 Hawk. c. 33, s. 46. If goods be stolen from a felon, they are laid to be the property of the Queen. *R. v. Whitehead*, 9 Car. & P. 429. Where waifs, strays, or treasure trove are stolen, they may be laid to be the property of some person to the jurors unknown; 2 East, P. C. 606; and the same in all other cases, where the name of the owner is not known, 1 Hawk. c. 33, s. 44. 2 Id. c. 25, s. 71, and see ante, p. 80, if facts be proved from which the jury may fairly presume that the goods were stolen. 2 Hale, 290. 2 East, P. C. 651.

If the goods be the property of partners, joint tenants, tenants in common or parceners, they may be stated to be the property of one of them, named, and "another" or "others:" 7 G. 4, c. 64, s. 14. Ante, p. 81; which provision extends to all joint stock companies and trustees. Id. See also stat. 7 G. 4, c. 46, s. 9. *R. v. Gaby*, R. & Ry. 178. *R. v. Steel*, Car. & M. 337. The property of friendly societies may be laid in the treasurer or trustees; 10 G. 4, c. 56, s. 21; *R. v. Cain*, Car. & M. 39; of loan societies, in the treasurer; 3 & 4 Vict. c. 110; of savings banks, in the trustee or trustees. 9 G. 4, c. 92, s. 8. The property of a corporation aggregate, must be laid in the corporation in its corporate name.

Where goods are stolen from a church, we have seen (ante, p. 352) that they may be laid to be the property of the rector, the churchwardens, or the parishioners; if stolen from a chapel, the property of the owner, or of the trustees. And where a Bible and hymn-book, which had been presented to the Methodists' society at Feckenham, were stolen from the Methodist chapel there, and were described as the property of John Bennett and others, Bennett being one of the society and also one of the trustees of the chapel: *Parke, J.*, held it to be correct. *R. v. Boulton*, 5 Car. & P. 537.

Goods and chattels provided at the expense of a county, riding, or division, for the building or repairing of a county bridge, or for a gaol, house of correction, infirmary, asylum, or other building,—may be described as the property of the inhabitants of such county, riding, or division. 7 G. 4, c. 64, s. 15; ante, p. 81, 82. Goods and chattels in a workhouse or poorhouse of a parish, township, or hamlet, or provided for the poor thereof, may be stated to be the property of the overseers of the poor of such parish, &c., without mention of their names; 7 G. 4, c. 64, s. 16; and where they were described as the property of "the overseers of the poor for the time being" of the parish of K., the judges held it to be sufficient. *R. v. Went*, R. & Ry. 359. Goods and chattels belonging to a poor law union,

or to a parish under guardians, by stat. 4 & 5 W. 4, c. 76, must be described as the property of "the guardians of the poor of the — union (or of the parish of —) in the county of —." 5 & 6 W. 4, c. 61, s. 7. 5 & 6 Vict. c. 57, s. 16, ante, p. 82. Materials or tools for making or repairing a highway in any parish, &c., may be laid to be the property of the surveyor or surveyors of the highways there for the time being, without mention of the names. 7 G. 4, c. 64, s. 16; see ante, p. 82. Goods, &c., belonging to a turnpike trust, or materials or tools for making or repairing the road, may be described as the property of the trustees or commissioners of the road, without naming them. 7 G. 4, c. 64, s. 17; see ante, p. 83. Property under the commissioners of sewers, may be described as the property of the commissioners within or under whose view, cognizance or management such things shall be, without naming them. 7 G. 4, c. 64, s. 18; see ante, p. 83.

If the name stated be that by which the party is usually called, it will be sufficient: where the prosecutor was called in the indictment John Hancox, and his real name was John Walter Hancox, but he was usually called and known by the name of John Hancox, Park, J., held it to be sufficient. *R. v. Berriman*, 5 Car. & P. 501. *Anon.* 6 Car. & P. 408, S. P. So, where the prosecutrix was named in the indictment by a name which she had assumed, and by which alone she was known in the neighbourhood, the judges held it sufficient. *R. v. Norton*, R. & Ry. 610. If the name be mis-spelt, it will not be deemed material. *R. v. Foster*, R. & Ry. 512. Or if there be a variance between the indictment and proof in the name of the party alleged to be owner, or in the ownership of the property, the court at the trial, if it consider such variance not to be material to the merits of the case, and that the defendant cannot be prejudiced thereby in his defence on such merits, to order such indictment to be amended according to the proof. 14 & 15 Vict. c. 100, s. 1; ante, p. 86.

Several counts.] By stat. 14 & 15 Vict. c. 100, s. 16, "it shall be lawful to insert several counts in the same indictment against the same person for any number of distinct acts of stealing, not exceeding three, which may have been committed by him against the same person, within the space of six calendar months from the first to the last of such acts, and to proceed thereon for all or any of them."

And by sect. 17, "If upon the trial of any indictment for larceny it shall appear that the property alleged in such indictment to have been stolen at one time, was taken at different times, the prosecutor shall not by reason thereof be required to elect upon which taking he will proceed, unless it shall appear that there were more than three takings, or

that more than the space of six calendar months elapsed between the first and the last of such takings; and in either of such last-mentioned cases the prosecutor shall be required to elect to proceed for such number of takings, not exceeding three, as appear to have taken place within the period of six calendar months from the first to the last of such takings." Before this statute, if several articles were named in the indictment, whether in the same or in different counts; and it appeared at the trial that the goods were stolen at several distinct times, the court would put the prosecutor to his election for which act of larceny he would prosecute, and would oblige him to confine his evidence to that. See *R. v. Smith and Jefferies*, Ry. & M., N. P. C. 295. But they would not do so, merely because the goods might have been, and probably were, stolen at different times, if, from anything appearing in the case, it were not impossible that they might all have been stolen at one time. *R. v. Dunn and Smith*, Ry. & M. 146.

Also, by stat. 11 & 12 Vict. c. 46, s. 3, in every indictment for feloniously stealing, it shall be lawful to add a count for feloniously receiving the same property, knowing it to have been stolen; and the jury upon the trial may find a verdict of guilty, either of stealing the property, or of receiving it knowing it to have been stolen; or if the indictment be found against two or more, the jury may find all or any of them guilty of stealing, or of receiving, or one or more guilty of stealing, and the other or others guilty of receiving. See ante, pp. 93, 94.

Verdict.] If upon an indictment for larceny, the evidence prove an embezzlement, the jury may find the defendant not guilty of the larceny, but guilty of embezzlement; and thereupon he shall be liable to be punished in the same manner as if he had been convicted upon an indictment for such embezzlement. 14 & 15 Vict. c. 100, s. 13. So, upon an indictment for larceny, the jury may find the defendant not guilty of the larceny, but guilty of an attempt to commit it. *Id.* s. 9. But if upon an indictment for larceny, the evidence prove an obtaining of money by false pretences, the jury are not at liberty to find the defendant guilty of the latter offence, or of the larceny, but he must be acquitted. Ante, p. 174. Upon an indictment for larceny, although a taking at one time only be stated, the jury may find a verdict of guilty generally, although evidence of three different takings within six calendar months have been given. See 14 & 15 Vict. c. 100, s. 17, ante, p. 360.

Before I state the evidence in larceny, it may be convenient that I should first state the definition of the offence at common

law, and give the decisions and other authorities which construe and explain each part of that definition.

Larceny, what.] Simple larceny at common law, is, the taking—and carrying away—of the personal goods of another, of any value,—against the will or without the consent of the owner,—without any *bona fide* claim of right,—with a felonious intent.

The taking.] The taking in larceny, is either actual or constructive: actual, where the party actually gets the goods out of the possession of the owner or his bailee, *invito domino*, by force or by stealth, or the like, upon which it is not necessary to make any further observation; constructive, where he obtains possession of them by some trick or artifice, or the like, not having the effect of transferring the right of property, but the possession only, having at the time a felonious intent to convert them to his own use, or to deprive the owner of them. This part of the subject shall be considered at length, when I come to treat of the evidence.

The carrying away.] If the goods be detached from the place where they were taken, any the slightest removal of them from the place, is a carrying away, within the definition of larceny. Where it appeared that the prisoner, who was sitting on the driving box of the Exeter mail coach, took hold of the upper part of a bag that was in the front boot, and lifted it from the bottom of the boot on which it rested; he handed the upper end of it to a person near him, and they were both endeavouring to pull it out of the boot, with a common intent to steal it, when the guard of the coach coming up, they dropped the bag again into the boot: the judges held that this was a complete asportation of the bag, sufficient to constitute larceny. *R. v. Walsh, Ry. & M.* 14. I shall notice other cases upon the subject, when I come to consider the evidence.

The personal goods of another.] At common law, larceny can be committed of personal chattels only:—not of things attached to the freehold, such as trees or vegetables growing, fixtures, or the like, for they are not personal chattels; 1 *Hawk. c.* 33, *s.* 34; not of bills of exchange or other written securities for money, for they are merely choses in action, not chattels; 1 *Hawk. c.* 33, *s.* 35; not of animals *feræ naturæ*, unless tamed or confined, and fit for the food of man. But horses, mules, asses, oxen, sheep, swine, goats, are personal chattels, and the subject of larceny; so are all other domestic animals which are fit for the food of man, such as turkeys, geese, hens, ducks, &c., and their eggs and their young. 1 *Hawk. c.* 33, *s.* 43. So, pulling the wool off a sheep's back and stealing it, has been holden to be larceny. 1 *Hawk. c.* 33,

s. 27. *R. v. Martin*, 1 *Leach*, 171. But dogs and cats are not the subject of larceny, at common law, not being fit for the food of man. 1 *Hawk. c. 33, s. 26*. Animals *feræ naturæ*, if reclaimed or confined, and fit for the food of man,—as fish in a pond; 1 *Hawk. c. 33, ss. 39, 41*; pheasants in a pheasandry; *R. v. Jones*, 2 *Russ.* 84; pigeons in an ordinary dovecot, *R. v. Cheafor*, 15 *Shaw's J. P.* 801, or the like,—are the subjects of larceny at common law; but not so, if not reclaimed or confined, 1 *Hale*, 511, 512, such as fish in a river or other great water, where they are at their natural liberty, 1 *Hawk. c. 33, s. 39*, or the like; or even if reclaimed, still if they are not fit for the food of man, such as monkeys, foxes, &c., they are not the subject of larceny at common law. 1 *Hawk. c. 33, s. 26*. Where upon an indictment for stealing “five live tame ferrets confined in a certain hutch,” although they were proved to be valuable animals, the judges held that the stealing of them was not larceny, and judgment was accordingly arrested. *R. v. Searing*, *R. & Ry.* 350. But it is laid down, in books of great authority, that stealing swans, marked or pinioned, or confined in a pond or private river, is larceny; 1 *Hale*, 511. 1 *Hawk. c. 33, s. 42*; and that stealing a hawk reclaimed is also larceny. 1 *Hawk. c. 33, s. 26*. In all these cases, however, which are not larceny at common law, the offence of stealing has been made punishable by statute, as we shall see hereafter. There is one case however, not larceny at common law, but made so by statute, which it may be necessary to mention more particularly, namely, where chattels, money, or securities for money, which had never been in the master's possession, were delivered to his clerk or servant for his use, and the clerk or servant, instead of delivering them to his master, sold them, or otherwise converted them to his use,—this formerly was not larceny. *R. v. Bazely*, 2 *Leach*, 835. *R. v. Bull*, *Id.* 841, *cit.* *R. v. Waite*, 2 *East, P. C.* 570. But it was afterwards altered by statute; see 39 G. 3, c. 85; and now, by stat. 7 & 8 G. 4, c. 29, s. 47, every such offender shall be deemed to have feloniously stolen the same from his master, although such chattel, money, or security, was not received into the possession of such master, otherwise than by the actual possession of his clerk, servant, or other person so employed.” And we have seen (*ante*, p. 361) that he may now be convicted of this offence, upon an indictment for larceny, by stat. 14 & 15 Vict. c. 100, s. 13.

Of any value.] Formerly, the stealing of goods, &c., of the value of twelve pence or under, was only petty larceny; above that value, was deemed grand larceny; and in the indictment therefore it was necessary and material to show the value of the articles stolen; and the value of each article alleged to be stolen was stated, that in case the jury should find the

defendant guilty of stealing one of them only, the offence might appear upon the record to be grand larceny. But the distinction between grand and petty larceny was abolished by stat. 7 & 8 G. 4, c. 29, s. 2; since which, it does not appear to have been necessary to state or prove the value of the article stolen, and I therefore omit it in the indictment. *See ante*, p. 357. In *R. v. Perry* (1 *Car. & K.* 725), the first count of the indictment was for stealing a cheque, but there being some doubt of a conviction on that count, as the cheque required a stamp and had none, a second count was added for stealing a piece of paper of the value of one penny of the goods and chattels of the prosecutor: the judges held that the defendant was properly convicted on the second count. Here the value of the piece of paper, though laid at a penny, could not be worth more as paper than perhaps the tenth part of a farthing; and if it were necessary to show that it was of some value, alleging it to be of the goods and chattels of the prosecutor was sufficient for the purpose. By stat. 14 & 15 Vict. c. 100, s. 24, however, no indictment shall be deemed insufficient for want of the statement of the value or price of any matter or thing, in any case where it is not of the essence of the offence.

Against the will or without the consent of the owner.] The taking and carrying away, must be *invito domino*,—against the will or without the consent of the owner. This is of the very essence of the offence. But it must be understood as meaning merely the absence of all free and voluntary consent, upon the part of the owner, to the party taking his goods and appropriating them to his own use. Where thieves had applied to a servant to aid them in robbing his master's house, and the servant having told his master of it, the latter, in order to detect the thieves and have them apprehended, desired his servant to carry on the affair, consented to his opening the door, marked the property, and even left some of it in a place where the robbers were likely to come: this was holden to be no defence to an indictment against the robbers. *R. v. Eggington*, 2 *Bos. & P.* 508. So, where one Norden, hearing that the early stage coach had been frequently robbed near town by a single highwayman, resolved if possible to apprehend him; and for that purpose he armed himself with a pistol, and accompanied the coach in a post-chaise; they were stopped by the highwayman, and Norden, upon his money being demanded, gave it, but then jumped out of the chaise, presented his pistol, and with the assistance of some others took the highwayman: this was holden clearly to be robbery, and the felon was convicted. *Norden's case*, *Fost.* 129. Where two servants in husbandry of the prosecutor opened the door of a granary belonging to their master by means of a false key, and took thereout two bushels of beans, for the purpose of giving them to their master's horses, in addition to

the quantity usually allowed them : eight of the judges held this to be larceny, and the prisoners had judgment accordingly. *R. v. Morfit et al.*, *R. & Ry.* 307. However hard such a prosecution may appear to be, the offence is undoubtedly larceny, the beans being taken without the consent of the master. And the decision has since been confirmed in two cases : one (*R. v. Handley*, *Car. & M.* 547), where the same point arose, and Patteson, J., had no doubt the offence was larceny, and refused to reserve the case for the opinion of the judges ; in the other (*R. v. Privett et al.*, 2 *Car. & K.* 114), Erle, J., reserved the point for the opinion of the fifteen judges, who held the offence to be larceny. But where Salmon, M'Daniel, and others, conspired to procure two persons, ignorant of the design, to rob Salmon on the highway, in order that they might obtain the reward at that time given for prosecuting offenders for highway robbery ; Salmon accordingly went to a particular place fixed upon, with some money, and the two men who were procured, being led there by one of the conspirators, robbed him, and they were afterwards prosecuted and convicted : but the conspiracy being afterwards detected, the conspirators were indicted as accessories before the fact to the robbery ; and the facts being found by a special verdict, the case was argued before all the judges, who held that the taking of Salmon's money was not a larceny, being done not only with his consent, but by his procurement, : and they distinguished it from Norden's case, for Norden parted with his money for the laudable design of apprehending the highwayman, in which case the money would be restored to him, but in this case Salmon gave his money freely with his consent, with the diabolical intent of convicting two persons of what was then a capital felony. *R. v. M'Daniel et al.*, *Fest.* 121 .

Without any bonâ fide claim of right.] If a man take goods under a *bonâ fide* claim of property or right, however mistaken, it is not larceny. 1 *Hale*, 506, 509. If a man take a horse *damage feasant*, or the lord of a manor seize a beast as an astray, imagining he has a right to do so, this, if done *bonâ fide*, although perhaps without title, is not larceny ; but if he were to put new marks on the horse or beast, or alter the old ones, this would show that the intent in taking it was felonious. 1 *Hale*, 506, 507. Where a number of persons broke into a house, and retook some tea for a friend of theirs which an exciseman had seized, this was holden to be no felony. *R. v. Knight et al.*, 2 *East*, *P. C.* 510. Where the captain of a foreign vessel, which was taken as prize, and brought into a British port, took some goods out of her, but not with an intention to convert them to his own use,—it was holden not to be larceny. *R. v. Van Muyen*, *R. & Ry.* 118. But if, on the contrary, the claim be but a pretence for fraudulently getting possession of personal chattels, the taking will

be larceny. As if A.'s horse be impounded, and B., having a design to steal him, enter a plaint in replevin, get the horse delivered to him, and run away with him, this is clearly larceny. 1 *Hale*, 507. 1 *Hatch*. c. 33, s. 12. So where a person, pretending to be the landlord of a house, obtained possession by means of a fraudulent ejectment, and had the tenant imprisoned by means of a latitat fraudulently sued out, and then rifled the house of all the goods contained in it, hid some, altered the marks of others, and sold the rest; and being asked what colour of title he had to do so, he pretended none: this was holden to be clearly larceny. *Farr's case*, *Kel.* 43, *T. Raym.* 276.

With a felonious intent.] The felonious intent, or *animus furandi*, means an intent fraudulently to appropriate the goods taken to the taker's own use,—or wholly to deprive the owner of them. This is an essential ingredient in larceny; without it, the taking is but a mere trespass. Whether the intent existed or not, is entirely a question for the jury, which, as in all other cases of intent, they must infer from the words or acts of the defendant, or from the nature of the transaction. *See ante*, pp. 119, 120. If the taking be by mistake,—as if another's sheep mix with a man's flock, and he, not knowing or taking heed of the difference, drive them home with his own, or even shear them,—it is not larceny; 1 *Hale* 507, 509; but if he knew them to be another's by the marks, which he defaces, or if he put his own mark on them, or if he conceal them, or deny having them, these are evidence that he took them with a felonious intent, and not by mistake. *Id.* So, if the taking be not with intent wholly to deprive the owner of the property, it cannot be larceny. Thus, for instance, where upon an indictment for larceny, it appeared that the prisoner had clandestinely taken the articles alleged to be stolen, merely for the purpose of inducing a young girl, the owner of them, to call for them, and thereby to give him an opportunity of soliciting her to commit fornication with him: the judges held that this was not a felonious taking. *R. v. Dickinson*, *R. & Ry.* 420. So, where upon an indictment for stealing two horses, it appeared that the prisoners took the horses out of the prosecutor's stables, rode them about thirty miles, and then left them at an inn, saying they would be back in three hours, and desiring that the horses should be taken care of; and the prisoners were afterwards taken on the same day about fourteen miles distant from the inn, and walking in a direction from it: the jury found that the prisoners took the horses merely for the purpose of riding them the thirty miles, and that they left them at the inn without intending to come back for them or dispose of them: ten of the judges held this not to be larceny. *R. v. Phillips et al.*, 2 *East*, *P. C.* 662.

Where a traveller met a fisherman with fish, who refused to sell him any, and he by force and violence took away some of the fish, and threw the fisherman money much above the value of them : judgment was respited, by reason of the doubt entertained of the existence of any felonious intent, the giving the fisherman money beyond the value of the fish being evidence to the contrary. 2 East, 661, 662, *the Fisherman's case*.

But where the intent is, to deprive the owner wholly of the goods, although the taker has no intention to apply them to his own use, it is equally larceny ; for although a taking *lucri causâ* is larceny, a taking in order to deprive the owner of the property is equally so. Where upon an indictment for stealing a horse, it appeared that the horse had before been stolen by one Haworth, who was about to be tried for the offence ; and the prisoner, in order (as he thought) to screen Haworth from conviction, clandestinely took the horse out of the prosecutor's stable, led him to a coal pit, and backed him into it, and the horse was killed : it was objected at the trial that this was not a larceny, because the taking appeared not to have been done with intention to convert the horse to the use of the taker, *animus furandi et lucri causâ* ; but seven of the judges held it to be larceny : and six of this majority held that to constitute larceny, it is not essential that the taking should be *lucri causâ*,—if it be fraudulent, and with intent to deprive the owner wholly of the property, it will be sufficient. *R. v. Cabbage, R. & Ry.* 292. So, in the case of the farm servants, noticed *ante*, p. 364, who stole their master's beans to give to his horses, they derived no advantage from the theft, but it had the effect of depriving the master of the beans.

And the felonious intent must be entertained at the time of the taking. Where a letter, containing a bill of exchange, directed to J. M., St. Martin's-lane, Birmingham, was delivered to another person of that name living near St. Martin's-lane, there being in fact no person residing in the lane of that name ; the party on opening the letter must have perceived that it was not for him, but he nevertheless applied the bill to his own use : the judges held this not to be larceny, as it did not appear that the party had any *animus furandi* at the time he received the letter. *R. v. Muchlow, Ry. & M.* 160. I shall have opportunities of showing other instances of this, in the course of the evidence, *post*.

By whom larceny may be committed.] A man cannot be guilty of larceny in taking his own goods, unless they be in possession of a bailee, and the taking of them will have the effect of charging him. 1 Hawk. c. 33, s. 47. If a man deliver goods to a tailor or carrier, and afterwards, with intent to make him responsible for them, fraudulently and secretly take them away, he is guilty of larceny. *Id.* Where the

owner of goods had them shipped for exportation by shipping agents, who gave the usual bond to the custom house ; but the owner, for the purpose of defrauding the revenue, had the bales relanded, the goods taken out, and rubbish substituted for them, in which state they were put on board a foreign vessel : the owner being indicted for this as a larceny, four of the judges held that it did not amount to that offence, as his intent was, not to cheat or charge the agents, but to defraud the crown ; but seven of the judges held it to be larceny, because the agents having given a bond to the custom house, the fraud would have the effect of charging them, by rendering them liable to a suit upon their bond. *R. v. Wilkinson and Marsden, R. & Ry.* 470.

A wife cannot be guilty of larceny of the goods of her husband except in those cases in which the husband himself might be guilty, as just now mentioned ; for they are one person in law. 1 *Hale*, 514. Where the wife of the prosecutor, and a man with whom she afterwards cohabited, jointly took money and goods belonging to the husband : the judges held that an indictment for larceny would lie against the man, although not against the wife ; and that notwithstanding the wife's consent, the property must be considered as having been taken *in vitæ domino*. *R. v. Tolfree, Ry. & M.* 243. Or if the wife take the goods, even her own clothes, and give them to an adulterer, or to a person with whom she intends to live in a state of adultery, the man will be guilty of larceny, the wife not. *R. v. Tollett and Taylor, Car. & M.* 112. But if the wife alone take away the husband's goods, and take them to the adulterer's lodgings, and they are placed by her in a room where the adultery takes place, and where they are afterwards found : the adulterer cannot be convicted of larceny merely on this proof, unless it can be proved that he had personal possession of them. *R. v. Rosenberg, 1 Car. & K.* 233. But if a wife deliver the husband's goods to any other stranger, the latter cannot be deemed guilty of larceny in taking them. 1 *Hawk. c. 33, s. 32.*

A joint tenant, or tenant in common of a personal chattel, cannot be guilty of larceny, by taking it, and disposing of the whole of it to his own use ; it is merely the subject of a civil remedy. 1 *Hale*, 513. But if he take it out of the hands of a bailee, with whom it is left for safe custody or the like, and the effect of such taking will be to charge the bailee, it is otherwise. Therefore where a woman, a member of a benefit society, entered the room of a person, with whom a box containing the funds of the society, was deposited for safe custody, and took and carried away the box, with intent to appropriate the contents to her own use : the judges were clearly of opinion that this was larceny, the bailee being answerable to the society for the property. *R. v. Phoebe Bramley, R. & Ry.*

478. *R. v. Cain, Car. & M.* 309. But where money belonging to a benefit society was deposited in a box, and placed in the custody of one of the members, and his wife broke open the box and stole the money: the judges held that an indictment as for larceny could not be maintained against her; for a wife cannot be guilty of stealing the goods of her husband, or goods in which he has a property jointly with others. *R. v. Willis, R. & Ry.* 470.

As to the mode of proceeding against juvenile offenders,—persons under the age of sixteen,—charged with simple larceny, *see ante*, p. 59. And as to larceny by clerks and servants, tenants and lodgers, *see post*.

Evidence.

1. Presumptive or Circumstantial Evidence of the Larceny.

Where there is no direct evidence of the larceny, by some person who actually saw the defendant commit it, his guilt can only be proved from his own admissions, or by evidence of facts from which the jury may fairly presume it. *See ante*, p. 135. Where goods stolen, are very shortly afterwards found in the possession of a man, who is unable satisfactorily to show by evidence in what manner he came by them, the presumption is that he is the person who stole them. It is therefore a very usual way of proving a larceny, to call the prosecutor or other person, in whose possession the goods were at the time they were stolen, to prove when he last saw them in his possession, and when he missed them; then to call some person who can prove that they were in the possession of the prisoner very shortly after they were stolen; and lastly to call some person to identify and prove the property in the goods. This is deemed good *prima facie* evidence of the larceny, and has the effect of throwing the onus upon the prisoner of proving that he honestly came by them. The presumption also may be very much strengthened, by proof of any circumstances of suspicion in the conduct of the defendant, with relation to the goods in question: such as selling them at an undervalue; his pawning them or getting some other person to pawn them for him in a feigned name; his concealing or disguising them; his denying their being or having been in his possession; his giving a false account of how or when he came by them; his being near the place where, and about the time when, they were stolen; or the like. In one case, *R. v. Crowhurst, 1 Car. & K.* 370, which was an indictment for stealing a piece of wood, it appeared that when it was found in the prisoner's possession, he said he had bought it of one Nash, who lived about two miles off; but Nash was not called as a witness for the prosecution: Alderson, B., laid it down as a general prin-

ciple, that when a man in whose possession stolen property is found, gives a reasonable account how he came by it, as by telling the name of the person from whom he received it, and who is known to be a real person,—it is incumbent on the prosecutor to show that such account is false. *See 2 East, P. C. 665.* And in a more recent case, *Ld. Denman, C. J.*, said that he agreed with Baron Alderson in what he had stated on that occasion, and that the case was correctly reported. *R. v. Smith, 2 Car. & K. 208.* Before the case above mentioned, however, it was the generally received opinion, that if a person set up that defence, either before the magistrate or at the trial, it was his duty to produce the witness to prove it, or if he were too poor to do so, the magistrate should send for the person named, and examine him if the prisoner wished it. However if the account given by the prisoner be not a reasonable one,—if for instance he say on one occasion he bought the article, and on another that he and two others found it hid in a hay-rick, *R. v. Dibby, 2 Car. & K. 818*, or the like,—this will impose no such burthen on the prosecutor. The possession of the goods by the prisoner, however, must be proved to be very recent after the felony committed. Where the goods were found in the prisoner's possession sixteen months after they were stolen, this was holden to be no evidence that he stole them. *Anon. 2 Car. & P. 459.* And in another case, where the stolen property was found in the prisoner's possession three months after it was stolen, *Parke, J.*, ordered the prisoner to be acquitted without putting him upon his defence. *R. v. Adams, 3 Car. & P. 600.* But where cloth was stolen in an unfinished state, and was found in the possession of the prisoner three months afterwards in the same state, *Patteson, J.*, held that under the circumstances the possession was sufficiently recent to raise the presumption of the prisoner's guilt. *R. v. Partridge, 7 Car. & P. 551.* However, in order to raise this presumption from the prisoner's possession of the goods, the previous possession of them by the prosecutor or his bailee, and the loss of them, must be clearly proved. Where upon an indictment for horse stealing, the prosecutor proved that he put the horse to agist with a person at a distance; that having heard from that person of the loss of the horse, he went to the field where it had been put to feed, and discovered it was gone; but the agister or his servant was not called, nor was any other evidence given of the loss of the horse: *Gurney, B.*, held this to be insufficient, for it was consistent with all this that the prisoner might have obtained the horse honestly from the agister, and not by felony. *R. v. Yend and Haines, 6 Car. & P. 176.*

There may be cases in which, from circumstances, it may appear doubtful whether the possession of the goods by the prisoner does not prove, rather, that he received them from

another who stole them, than that he stole them himself. Where goods stolen were shortly afterwards found concealed in an old engine-house, and the place being watched, the prisoners were observed to go there and take them away: the prisoners being indicted as receivers, there being no evidence of the goods having been stolen by any of them, Patteson, J., after remarking that this seemed to be evidence more of stealing than receiving, told the jury that if they were of opinion that the prisoners stole the goods, they must be acquitted on the present indictment; and the jury being of opinion that the prisoners stole them, they were accordingly acquitted, *R. v. Dursley et al.*, 6 Car. & P. 399. In all such cases, and indeed in all cases where there is only presumptive or circumstantial evidence of the defendant's guilt, it is prudent to add to the count for larceny a count for receiving the goods knowing them to have been stolen. *See post, tit. "Receiving."*

It is only in the absence of direct evidence of the larceny, or where there is such evidence but it cannot prudently be depended upon, that the above mode of proving it by circumstantial evidence is resorted to. Where there is direct evidence, however, the larceny of course is proved by the persons who actually saw the prisoner commit it; and if there be at all a doubt whether their testimony will be believed by the jury, such part of the above circumstantial evidence may be given, as may be necessary to strengthen and confirm it.

Although there be but one count for larceny, the prosecutor may give in evidence three distinct larcenies by the prisoner of different portions of the goods mentioned in the indictment, at different times within six months from the first to the last of them. 14 & 15 Vict. c. 100, s. 17.

2. *Direct Evidence of the Larceny.*

The direct evidence of the larceny, consists of proof of the taking,—the carrying away,—and the felonious intent:—

1. The prosecutor must prove the taking:—and the taking in larceny, we have seen (*ante*, p. 362), is actual or constructive.

An actual taking is, where the party actually takes the goods out of the possession of the owner or his bailee, *invito domino*, by force or by stealth, or the like, with a felonious intent. Upon this it is not necessary to make any further observation; but in what I am about to state, I shall confine myself entirely to the doctrine of constructive takings in larceny.

A constructive taking, is, where a man, with a felonious

intent to convert goods to his own use, or to deprive the owner wholly of them, obtains possession of them by some trick or artifice or the like—by which he acquires the possession only, but which has not the effect of transferring any right of property in the goods from the owner to the party who has thus obtained possession of them; if a right of property pass, the offence is not larceny, but the obtaining of goods under false pretences. This distinction is strongly exemplified by the following cases:—

Davenport was indicted for larceny, in stealing two silver cream ewers from the prosecutor, a silversmith; he was formerly servant to a gentleman, who dealt with the prosecutor; sometime after he left this gentleman's service, he called at the prosecutor's shop, and saying that his master (meaning the gentleman whose service he had left) wanted a silver cream ewer, desired the prosecutor to give it to him, and put it down to his master's account; the prosecutor gave him two ewers, in order that his master might select that which he liked best; the prisoner took both, sold them, and absconded: the prosecutor at the trial swore that he did not charge his customer with these cream ewers, nor did he intend to charge him with either, until he should have first ascertained which of them he would have chosen; it was objected for the defendant, that this amounted merely to the obtaining of goods by false pretences, and not to larceny; but Bayley, J., held, that as the prosecutor had parted with the possession only, and not the right of property, the offence was larceny; if indeed he had sent but one cream ewer, in the execution of the pretended order, and had charged the customer with it, it would have been otherwise. *R. v. Davenport, cor. Bayley, J., Newcastle Spring Assizes, 1826.* In a case similarly circumstanced, but where the person in whose name the goods were obtained was not called as a witness, nor was there any evidence that she had not sent the prisoner for the goods: Patteson, J., held that on that account the prisoner should be acquitted; for *non constat* but that the prisoner had been sent for the goods, as she had stated, and had delivered them to the person who sent her. *R. v. Ann Savage, 6 Car. & P. 143.* The substance of this last decision is, that the pretence by which goods have been obtained, must be proved to be false, in larceny, in the same manner as upon an indictment for obtaining them by false pretences. So, where it appeared that a servant of the prosecutor, being sent to a fair with some oxen, to sell them for ready money, the prisoner bargained with him, and desired him to go to the inn, and he would pay him for them; he went accordingly to the inn, but the prisoner never came; and upon his going back to the fair, he found that the oxen were gone; the prisoner had taken them, and sold some of them: upon the trial of the

prisoner, as for larceny, these facts were proved, and the servant in his evidence said that he would not have delivered the oxen until he was paid : the jury being of opinion that the prisoner never meant to have paid for the oxen, found him guilty ; and the judges afterwards held the conviction to be right. *R. v. Gilbert, Ry. & M.* 185. So, where the prisoner, under pretence of buying four casks of bristles, obtained a delivery order to a wharfinger for them, undertaking to pay cash for them before they should be taken out of the cart at his door ; but instead of taking them to his house or shop, he had them taken to a warehouse in a different direction, and endeavoured to sell them : the jury having found that the prisoner had no real intention of buying the goods, but merely to get them by fraud from the owner, the judge held this to be larceny. *R. v. Pratt, Ry. & M.* 250. So, where upon an indictment for larceny, it appeared that the prisoner ordered the articles, mentioned in the indictment, of a tradesman, and desired them to be sent at a certain hour to the coach office, and he should pay for them ; the tradesman took the goods, packed in a case, and there met the prisoner, who pretended that a friend from whom he was to receive the money had not come ; he said he was to receive 200*l.* from his friend at Tom's coffee house, at seven o'clock that evening, and appointed with the tradesman to meet him there at that time ; and it was agreed that in the mean time the goods should be left with the book-keeper at the coach office, the prisoner saying that he was going to Manchester the next day by the coach, and would take the package with him ; the prisoner however called in about two hours afterwards, told the book-keeper that he had changed his mind, and took away the goods ; the tradesman called in the evening at the coffee house, but the prisoner was not there ; but he was afterwards found at a house on the other side of the river, with the case unpacked, and the goods all about the room ; the prosecutor swore that he never intended to part with the goods until the money was paid ; and the jury were of opinion that when the prisoner first called on the tradesman, he had no intention of buying and paying for the goods, but merely gave the order for the purpose of getting the goods out of the possession of the tradesman, and converting them to his own use : the prisoner being convicted, the judges held the offence to be larceny. *R. v. John Campbell, Ry. & M.* 179. Where one Greatrix, in the character of servant to Sharpless, left a note at a hosier's, ordering some silk stockings to be sent to his master's lodgings ; the hosier accordingly took six pair as directed, Greatrix opened the door to him, and introduced him into a parlour where Sharpless was sitting in his dressing gown, his hair being just dressed, and an unusual quantity of powder over his face ; Sharpless looked at the stockings,

and inquired the price, and without making any agreement, sent the hosier back for some pieces of silk for breeches and a pair of black silk stockings with French clocks; the hosier hung the six pair of stockings on the back of a chair, and went back for the silk, &c., and during his absence Greatrix and Sharpless decamped with the goods, and one of them pawned them; being indicted for larceny and convicted, the judges held the conviction to be right, for there was not a sufficient delivery of the stockings to change the property. *R. v. Sharpless and Greatrix*, 2 *East*, *P. C.* 675, 1 *Leach*, 108. So, where the prisoner met a tradesman's apprentice going along Ludgate-hill with two parcels under his arm, directed to a Mr. Heath, and asked him if he were going to Mr. Heath, and the lad answered that he was; the prisoner then gave the lad a parcel, (which was afterwards found to contain two dish-clouts of no value,) and desired him to take it to his master directly, that he might send it to a Mr. Brown, and saying that the two parcels the lad had were for him, he took them from him with the lad's consent; after parting from him however, the lad began to think that he had done wrong, and he followed him and asked him if he were Mr. Heath, and he said he was, upon which the lad was satisfied and went back to his master: the prisoner being convicted of larceny, the judges held the conviction to be right. *R. v. Wilkins*, 2 *East*, *P. C.* 673. So, if a man go into a shop, under pretence of buying goods, and upon their being given to him to look at, he run away with them,—or if a man go to a market, and obtain a horse for the purpose of trying its paces, and ride away with it,—this is larceny. 1 *Hawk. c.* 33, *s.* 15.

But where the prisoner was indicted for horse stealing, and it appeared that the prosecutor being at a fair with a horse for sale, the prisoner, who was known to him, met him, and proposed to purchase it, and after walking together in the fair, and after viewing the horse, the prosecutor said he should have it for 8*l.*, and ordered his servant to deliver it to him; upon which the prisoner mounted the horse, telling the prosecutor he would return immediately and pay him, to which the prosecutor replied "very well," and the prisoner then rode away and never returned: Gould, J., ordered an acquittal, saying that there was a complete contract of sale and delivery, and the prosecutor had wholly parted with the property as well as the possession. *R. v. Harvey*, 2 *East*, *P. C.* 669. 2 *Leach*, 523. So, where the prisoner purchased a piece of silk of the prosecutor, and told him to send it that evening, to No. 6, Arabella-row, and he would pay him for it; the prosecutor accordingly sent his shopman with it, who received two bills of exchange for 10*l.* each (the silk amounting to 12*l.* 10*s.*), the prisoner saying that he would call and make further purchases; the transaction was regularly entered in the prosecutor's books, and the prisoner debited with the silk:

but the bills were found to be worth nothing, no such person as the drawer being known by the drawee, and the prisoner himself was not seen afterwards until he was apprehended: being indicted for larceny, the judges held that it did not amount to that offence, as the property in the silk as well as the possession had been parted with. *R. v. Parks*, 2 *East*, *P. C.* 671. 2 *Leach*, 703. So, where the prosecutor, a hatter, sold a hat to one of his customers, and the prisoner, knowing the circumstance, sent a messenger to the prosecutor for the hat in the name of the customer, and obtained it: the judges held this not to be larceny, but an obtaining of the hat by a false pretence merely, for the hatter had parted with the property as well as the possession. *R. v. Phineas Adams*, *R. & Ry.* 225. So, where the prisoner sent a note to one Dunn, in the name of Broad, Dunn's friend, asking for the loan of 3*l.*, and obtained it: this was holden by the judges not to be larceny, because the property as well as the possession of the money was intended to pass from the lender. *R. v. Atkinson*, 2 *East*, *P. C.* 673.

Where the prosecutor, a tallow chandler, was in the habit of purchasing fat from butchers, which was weighed in scales which were in a room upon the premises; the prisoner, a servant in his employ, intending to defraud his master, took a quantity of fat out of his master's store, put it into the scales, and pretended that it was fat sent for sale by one Robinson a butcher; the fraud however being detected, the prisoner ran away: being indicted for larceny and convicted, the case was reserved for the opinion of the criminal appeal court, and the judges held that the taking and asportation clearly amounted to larceny; the prisoner intended to dispose of it to his own use by selling it, and it was no matter to whom it was sold. *R. v. Hall*, 2 *Car. & K.* 947. And where a workman employed to melt pig iron, and paid according to the weight of the metal drawn from the furnace and made into puddle bars, was detected in putting an old axle belonging to his master into the furnace, to increase the weight to be drawn from it; the value of the axle was about 7*s.*, but the workman would gain little more than a penny by the additional weight: being indicted as for larceny, Tindal, C. J., doubted whether it amounted to that offence, as the workman intended to render back the iron, although in another form, to his master; but he left it to the jury to say whether the defendant put the axle into the furnace, with a felonious intent to convert it to a purpose for his own profit, for if he did, it was larceny; and the jury found the prisoner guilty. *R. v. Richards*, 1 *Car. & K.* 582. But in a more recent case, where a journeyman tanner was indicted for stealing 120 skins, the property of his master, it appeared that he took the 120 skins, which had been dressed by other workmen, from the stock of his master, carried them to another part of the premises where he worked, and

put them among the skins he was dressing; and the jury found that he did not intend to remove the skins from the tannery, and dispose of them elsewhere, but that he intended to deliver them to the foreman, and get paid for them as for his own work; they found him guilty, however, under the direction of the court, and the point was reserved for the opinion of the criminal appeal court: the judges held that it was not larceny; it was but an attempt to obtain money by a false pretence. *R. v. Hollaway*, 2 Car. & K. 942.

Where the prisoner went to a shop and asked for change of half-a-crown, and the person attending gave him two shillings and six penny pieces; he then held out the half crown, and the other just took hold of it by the edge, but never actually got it into his custody; the prisoner immediately ran away with both the half crown and the change: being indicted for stealing the two shillings and six pennies, Park, J., held that it was larceny, but he said that if he had been indicted for stealing the half crown, he should have entertained great doubt whether the indictment would lie. *R. v. Williams*, 6 Car. & P. 390. So, where the prisoner was displaying a quantity of gold coin in a public house, the prosecutor asked him to change some for bank notes, which he did to a small amount; seeing that the prosecutor had a quantity of bank notes, he then offered the prosecutor to get him gold for more of them, and the prosecutor then put down notes to the amount of 35*l.*, which the prisoner took up, and saying that he would be back presently with the gold, left the place and never returned: Wood, B., held this to be larceny, if the jury believed that the prisoner, at the time he took up the notes, had the felonious intention of applying them to his own use; the property in the notes never passed from the prosecutor, for he only meant to part with his notes on the faith of receiving the gold in return, and the prisoner never meant to barter, but to steal. *R. v. Oliver*, 4 Taunt. 474, *cit.* 2 Leach, 1072. In a more recent case, upon an indictment for stealing a sovereign, it appeared that the prosecutor was treating the prisoner to some beer in a beer shop, and handed a sovereign to the landlady to pay for it, but as she had not change she put it down on the table at which he and the prisoner were sitting; the prisoner then said that he would go and get change for it, and took it up for the purpose, the prosecutor said, "you will not come back with the change," to which the prisoner answered, "never fear," and went out, but never returned; the prosecutor in his evidence said that he offered no opposition to the prisoner's taking the sovereign to get it changed, but allowed it to lie on the table after the prisoner made the offer: Coleridge, J., after conferring with Gurney, B., held that this was not larceny of the sovereign, for the prosecutor, when he permitted it to be taken away, could never have expected to receive the

same identical coin back again. *R. v. Thomas*, 9 *Car. & P.* 741. It is to be remarked that in the last case, there was nothing from which the jury could infer that the prisoner at the time he took the sovereign had the felonious intent to appropriate it to his own use. Also, where the prisoner went to a tradesman's shop, and said her mistress, Mrs. Cook, a neighbour, would be obliged to him to let her have half a guinea's worth of silver, and that she would send the half guinea presently: the tradesman let her have the silver, but she never returned: this was holden to be no larceny, but a false pretence merely. *Coleman's case*, 2 *East*, *P. C.* 672. 1 *Leach*, 339. So, where upon an indictment for stealing in the house of a pawnbroker a diamond brooch and other articles, it appeared that the prisoner called at the shop of the pawnbroker with duplicates of the brooch, &c., mentioned in the indictment, which he had before then pawned there for 34*l.*, and desired to redeem them; he at the same time showed the pawnbroker's shopman a parcel of loose diamonds which he wished to pawn, and the shopman agreed to lend 160*l.* upon them; he sealed the parcel of diamonds in the shopman's presence, and gave him what he believed, at the time, to be the same parcel: the shopman then gave him the brooch, &c., mentioned in the indictment, and the balance of the 160*l.*, after deducting the 34*l.* for which the brooch, &c., were pledged, and interest; but the parcel, upon being afterwards opened, was found to contain merely some coloured stones of little value: the shopman swore that he was authorized by his master to receive money for pledges, and to lend money on them; and that when he delivered the articles in question, he parted with them entirely, believing he had received a full equivalent: this case being referred to the judges, they held that it was not larceny, because the shopman parted with the property and ownership, and not merely with the possession. *R. v. Jackson*, *Ry. & M.* 119.

In the practice of ring-dropping (which was formerly so prevalent), if the prosecutor merely deposit his money, &c., with the pretended finder, as a security that he will account with him for his share of the produce of the property found, the offence will be larceny. *R. v. Patch*, 2 *East*, *P. C.* 678, 1 *Leach*, 238. *R. v. Watson*, 2 *East*, *P. C.* 680. *R. v. Moore*, *Id.* 679. But if the prosecutor give him a sum of money, &c., for his share of the property found, it will not. *R. v. Wilson*, 8 *Car. & P.* 111. So, where money is obtained from a man by means of a pretended bet,—if he merely deposit the money with the party as a stakeholder, who hands it to his confederate under pretence that he has won it, the offence is larceny. *R. v. Foster, Gill, Fewster, and Nicholson*, *R. & Ry.* 413. So, where three persons in a public house acting in concert, induced the prosecutor to lodge 100*l.* in the hands of one

of them, upon a pretended bet that he could not produce so much money; the person with whom it was lodged, counted it, and upon his reporting that there was 100*l.* in it, it was admitted that the bet was lost; he then handed the 100*l.* over to one of the others, and upon some pretence induced the prosecutor to go outside the public house with him, and whilst they were absent the other two absconded with the money: the judges held this to be larceny, and that all were equally guilty. *R. v. Standley, Jones, and Webster, R. & Ry.* 305. On the other hand, where upon a pretended wager of this kind, the prosecutor paid his money, on the wager being determined against him, imagining it to be fairly won: the judges held it not to be larceny, because the prosecutor had parted not only with the possession of his money, but with the property in it also. *R. v. Nicholson, Jones, and Chappel, 2 East, P. C.* 669, 2 *Leach*, 698.

Upon the trial of an indictment for stealing a bill of exchange, it appeared that the prisoner obtained the bill from the prosecutor under pretence of discounting it, and desired the prosecutor to come with him to Pulteney-street, and he would give him the money; the prosecutor sent his clerk with him, desiring the clerk privately not to leave the prisoner without receiving the money, nor to lose sight of him; they went accordingly to Pulteney-street, and the prisoner showed the clerk into a room, and bid him wait there for a quarter of an hour and he would bring the money; the clerk however followed him down Pulteney-street, and in turning the corner of an adjoining street he missed him; the prosecutor and his clerk remained for three days and nights at the room in Pulteney-street, but without seeing the prisoner, and it was not until some time afterwards that he was apprehended elsewhere, when he expressed his sorrow for what he had done, and promised to return the bill: at the trial, the judge left it to the jury to say, first, whether they thought the prisoner had a concerted design to get the bill into his possession with intent to steal it, and the jury said he had; and secondly, whether the prosecutor intended to part with the bill to the prisoner, without having the money paid first, and the jury answered in the negative; and they were directed then to find him guilty: the case being afterwards referred to the judges, they held the conviction to be right. *R. v. Aickles, 2 East, P.* 675; 1 *Leach*, 330.

Upon an indictment for stealing three chests of tea, the property of S. Tanner and others, it appeared that Tanner & Co. were carriers between London and Tewkesbury; the prisoner, Longstreeth, calling himself Langstan, came to Tanner's office at Tewkesbury, and inquired if there were any teas for him; the porter informed him that there were three chests directed to J. Creighton, whom he did not know; the prisoner said they were for him, and that the party who had

sent them, had spelt his name wrong by mistake; he paid the carriage and portage, the three chests were delivered to him, and he afterwards removed and concealed them; the teas in fact were not his, but belonged to a person named Creighton to whom they were directed: the prisoner being convicted, it was referred to the judges to say whether this was a larceny; and they held that it was; for as the carrier's servant had no authority to deliver the teas to the prisoner, the property was not parted with by such delivery. *R. v. Longstreet, R. & M.* 137. So, where the prisoner went to an inn at Sodbury on the fair day, and desired the ostler to bring out his horse, and upon the ostler saying he did not know which was his, he went into the stable with him, and pointing to a mare said it was his, and the ostler brought it out; he then attempted to mount her, but the mare being frightened he could not effect it; he then desired the ostler to lead the mare out of the yard, which was accordingly done, but before he could mount her some person who knew the mare came up, and he was detected and secured: Garrow, B., held this to be larceny. *R. v. Pitman, 2 Car. & P.* 423.

The cases I have here given, under the head of a constructive taking in larceny, show clearly the distinction between parting merely with the possession, and parting with both possession and property in the goods; in the former case it is larceny, in the latter the offence is not larceny, but an obtaining of the goods by false pretences. But however well established this general rule may be, there may be cases coming so exactly upon, or so near to, the line of distinction between the one offence and the other, that there may be some difficulty in deciding whether they amount to larceny, or to the obtaining of money, &c., by false pretences. In such cases, it is always advisable to indict the offender for the latter offence; for by stat. 7 & 8 G. 4, c. 29, s. 59, if upon such indictment, "it shall be proved that he obtained the property in question in any such manner as to amount in law to larceny, he shall not, by reason thereof, be entitled to be acquitted of such misdemeanor."

As to cases where the possession of goods, &c., has been obtained by means of false or fraudulent proceedings in courts of justice, see *ante*, p. 366.

Although in these cases of constructive taking, the possession of the goods is mostly obtained with the consent of the owner or bailee, yet the taking of them for the purpose of applying them to the taker's own use, or of otherwise permanently disposing of them, must be against the will, or without the consent, of the owner. See *ante*, p. 364.

2. The prosecutor must prove the carrying away or asportation. This is an essential part of the offence of larceny. But any the slightest removal of the thing taken, will be sufficient,

although it be not quite carried off. 1 *Hawk. c. 33, s. 25*. Where a guest, having taken the sheets from his bed with intent to steal them, carried them into the hall, but was apprehended before he could get them out of the house, *Id.*,—where a man took a horse in a close, but was apprehended before he could get him out of it, *Id. s. 26*,—where a man pulls the wool off a sheep, or takes the skin off, *Id. s. 27*,—where a man, intending to steal plate, takes it out of the trunk which contained it and places it on the floor, but is detected before he can carry it off, *Id. s. 28*:—all these have been holden sufficient asportations to constitute larceny. Where it appeared that the prisoner, who was sitting on the driving box of the Exeter mail coach, took hold of the upper end of a bag that was in the front boot, and lifted it from the bottom of the boot on which it rested; he handed the upper end of it to a person near him, and they were both endeavouring to pull it out of the boot, with a common intent to steal it, when the guard of the coach coming up, they dropt the bag again into the boot: the judges held this to be a complete asportation of the bag, sufficient to constitute larceny. *R. v. Walsh, Ry. & M. 14*. Where a man caused a mare to be brought from the stable into the yard, with intent to steal it, but before he could mount and ride away, he was detected,—this was holden a sufficient asportation. *Pitman's case, ante, p. 379*. Where the prisoner snatched at an ear-ring, in a lady's ear, tore it from the ear, but it fell amongst her hair, where she found it on her return home,—this was holden a sufficient asportation, and (from the force and violence with which it was effected) robbery. *R. v. Lapier, 2 East, P. C. 557*. 1 *Leach, 360*. So, where a man removed goods from the head to the tail of a waggon, with a felonious intent, it was holden a sufficient asportation. 1 *Hawk. c. 33, s. 29*. *R. v. Coslet, 1 Leach, 236*. So, where the prisoner tapped a barrel of beer, with intent to steal the beer, and as beer was running from the barrel into a can, he was detected; this was holden to be a sufficient asportation. *R. v. Wallis, 12 Shaw's J. P. 236*. So, where it appeared that the prisoner drew a pocket book out of the inside breast pocket of the prosecutor's coat, about an inch above the top of the pocket; but the prosecutor suddenly putting his hand up, the prisoner let go the book, whilst it was still about the person of the prosecutor, and the book fell back again into the pocket: the judges held this to be a sufficient asportation to constitute simple larceny, although the larceny from the person was incomplete. *R. v. Wm. Thompson, Ry. & M. 78*.

But where a thief was not able to carry off goods he intended to steal from a shop, on account of their being attached by a string to the counter, this was holden not to be a sufficient asportation to constitute larceny, because there was no sever-

ance, the goods all the time being attached to the counter, *Anon.* 2 *East*, P. C. 556. So, where a thief was prevented carrying off a purse, on account of some keys attached to the strings of it getting entangled in the owner's pocket, it was holden not sufficient, for the same reason. *R. v. Wilkinson*, 1 *Hale*, 508. 2 *East*, P. C. 556. So, where the prisoner merely turned a bale on end where it lay, for the purpose of cutting it open and taking the goods out, and he was detected before he effected his purpose: this was holden not to be a sufficient asportation. *R. v. Cherry*, 2 *East*, P. C. 556. So, where the prisoner, with a felonious intent, stopped a man carrying a feather bed, and told him to lay it down or he would shoot him; the man laid the bed upon the ground, but before the prisoner could take it up, so as to remove it from the spot where it lay, he was apprehended: the judges held the offence to be incomplete. *R. v. Farrel*, 1 *Leach*, 266 n. But now, in these cases, where the asportation is holden to be insufficient, the jury may find the defendant not guilty of the larceny, but guilty of an attempt to commit it, by stat 14 & 15 Vict. c. 100, s. 9. *Ante*, p. 174.

3. The felonious intent. The intent to steal, or *animus furandi*, has been sufficiently defined, and exemplified by authorities, *ante*, p. 366. We have there seen that the taking and carrying away, must be either *lucri causâ*, for the purpose of appropriating the property to the taker's own use,—or for the purpose of depriving the owner permanently of it. It is a question entirely for the jury; and, as in all other cases of intent, they must judge of it from the words or acts of the defendant. If, without any *bonâ fide* claim of right (*see ante*, p. 365) he have appropriated the property taken to his own use, or have permanently deprived the owner of it, they may fairly infer that the taking was with that intent; but if he were detected before he succeeded in doing so, the jury have then to judge of the intent from the words or acts of the defendant, the mode of taking the property, the circumstances attending it, or any other facts from which they may fairly infer the defendant's intention, *see ante*, p. 119, 120, and the prosecutor must provide himself with proofs accordingly. And in all cases of larceny, it must appear that the intention to steal existed at the time of the taking, or facts must be proved from which that may fairly be inferred. Where a letter containing a bill of exchange, directed to J. M., St. Martin's-lane, Birmingham, was delivered to another person of that name living near St. Martin's-lane, there being in fact no person of that name residing in the lane; the party, upon opening the letter, must have perceived that it was not for him, but he nevertheless applied the bill to his own use: the judges held this not to be larceny, as it did not appear that the party had any *animus*

Swandi, at the time he received the letter. *R. v. Muchless*, *Ry. & M.* 160. So, where a woman saved some goods of the prosecutor, at a fire which was at his house, and took them home to her lodgings, and the next morning denied that they were in her possession: being tried for stealing them, the jury being of opinion that at the time the woman took them, her intention was to save them from the fire and restore them to the owner, and that she had no intention to appropriate them to her own use until afterwards, the judges held it not to be larceny. *R. v. Leigh*, 2 *East*, *P. C.* 694. So, where a man hired a horse for a particular purpose, but the day following, after the purpose for which he borrowed the horse was over, he rode the horse in a different direction and sold it; it appeared however that he did not offer the horse for sale, but an application being made to him to sell it, he sold it; and upon his trial as for a larceny, the jury found that at the time he borrowed the horse he had no felonious intention: the judges held that this was not larceny; that if the prisoner had not a felonious intention at the time he took the horse, his subsequently withholding and disposing of it did not constitute a new felonious taking; and that the doctrine laid down in 2 *East*, *P. C.* 690. 694, and 2 *Russell*, 1089, 1090, to the contrary, was not correct. *R. v. Banks*, *R. & Ry.* 441.

If goods be bailed by the owner to another, the bailee, whilst the bailment subsists, cannot in general be said to commit larceny of them, by converting them to his own use; because in such a case there is no felonious taking, the bailee being already in possession of the goods. 1 *Hawk. c.* 33, *s.* 2. *R. v. Smith*, *Ry. & M.* 473. But even in that case, if it appear that the party procured the goods to be bailed to him with a felonious intent of appropriating them to his own use, or if he entertained such intention at the time the owner voluntarily bailed the goods to him, his afterwards so appropriating them, would be larceny. Where a man hired a mare to go to Sutton, in Surrey, and back the same evening, giving a false address, and it appeared that in the afternoon he took the mare to Smithfield and sold her: being indicted for larceny and convicted, the jury finding that his hiring the mare was a mere pretence to get her into his possession, and steal her: a majority of the judges held it to be larceny. *Pear's case*, 2 *East*, *P. C.* 685, 1 *Leach*, 258. *S. P. Charlewood's case*, 2 *East*, *P. C.* 689, 1 *Leach*, 456. So, where the prisoner hired a carriage for three weeks or a month from a coachmaker, took it away and never returned it; he absconded and was not heard of for a year, when he was apprehended on another charge; what became of the carriage did not appear; being indicted for larceny, it was left to the jury to say whether he obtained the carriage with an honest intent to return it, or with a felonious intent to apply it to his own

use; and the jury found him guilty, and he was transported. *Major Semple's case*, 2 *East*, P. C. 691, 2 *Leach*, 470. But in *Banks' case*, already mentioned, (*ante*, p. 382), where the prisoner hired a horse for a particular occasion, and after that was answered, he rode the horse in a different direction, and sold it: the jury having found, that at the time he hired the horse he had no felonious intention, the judges held that it was not larceny. *R. v. Banks*, R. & Ry. 441. Where the prosecutor gave his watch to the prisoner, a watchmaker, to repair, and the prisoner sold it, *Vaughan, B.*, held that it was not larceny; if indeed he had obtained it by trick or fraud, it would have been different, but here it had been voluntarily delivered to him. *R. v. Levy*, 4 *Car. & P.* 241. And the same point was so decided by the criminal appeal court, in a recent case. *R. v. Thistle*, 19 *Law J.* 66 m. 2 *Car. & K.* 842, 843. But where the prosecutor hired the prisoner to drive fifty sheep to a certain fair, and the prisoner, instead of driving them towards the fair, drove them in a contrary direction, and sold ten of them on the very morning he received them; and the jury were of opinion that the prisoner, at the time he received the sheep, intended to convert them to his own use: the judges held this to be larceny. *R. v. Stock*, Ry. & M. 87. And where a farmer hired a person, who sometimes acted as drover to him, but was not regularly in his service, to drive some sheep for him to Grantham fair, at the wages of 3s. a day; the master sold some of them there, and then sent the remainder by the prisoner to Smithfield market; but the prisoner, instead of taking them there, sold them and absconded with the money: although the jury found that the prisoner, at the time he took the sheep under his care, had no intention to steal them, yet the judges held him to be guilty of larceny; for being the owner's servant, his possession was the possession of the owner, who therefore had not parted with either the possession or the right of property. *R. v. M'Namee*, R. & M. 368. The judges here seem to have assumed that the prisoner was a servant to the prosecutor; and no doubt if he were so, the offence was larceny. But it is very questionable whether he was a servant, or was not rather a bailee; the authority of the case is doubted, and the court in *R. v. Hey*, which I shall mention presently, doubted whether it would now be decided in the same way. In *R. v. Hey* (2 *Car. & K.* 983), which was an indictment against the defendant, as servant to the prosecutors, for stealing ten pigs their property, it appeared that the prosecutors, who were pig-jobbers at Newcastle, having purchased some pigs, and thinking they would suit one G., at Leeds, employed the prisoner, who was a butcher and drover, to take them to G., at Leeds, by the railway, and gave him money to pay the expenses; there was no agreement as to what was to be paid to him for his trouble, but there was a

custom in the trade to allow drovers a certain sum per day, and they might drive cattle for any other person at the same time; the prisoner accordingly took the pigs to G.'s house at Leeds, very early in the morning, before the inmates were up, and G. being from home, his wife called to a man, to whom she referred the prisoner, and the man opened a window, looked out, and said, "is that you?" and then shut down the window and disappeared, without listening to the prisoner or giving him any directions; the prisoner then drove the pigs to Leeds market, sold them for 35*l.* and absconded with the money: being found guilty, and the case being reserved for the opinion of the criminal appeal court, the judges held that he was not a servant but a bailee, and as it was clear that he entertained no felonious intent at the time the pigs were given to him, the conviction was wrong. Where, in a similar case, there was no evidence of the defendant being the prosecutor's servant, it was holden that he could not be convicted. *R. v. Goodbody*, 8 *Car. & P.* 665.

But if a carrier or other bailee open a bale or package of goods entrusted to him, take out a part, and dispose of that part to his own use, this is considered such proof of an original felonious intention, that it has always been holden to be larceny; 3 *Inst.* 107. 1 *Hale*, 505. 1 *Hawk. c.* 33, *s.* 4; although if he dispose of the whole bale or package, without breaking it, it will be deemed a breach of trust only, and not a felony, unless it appear that he had a felonious intent at the time he received it, as above mentioned. Where the prisoner was employed to land a boat load of staves from a ship, and he landed them all but two, and those he secreted in the bottom of the boat, it was holden that the separating the two from the rest, and secreting them, was equivalent to breaking bulk, and that the prisoner was guilty of larceny. *R. v. Howell*, 7 *Car. & P.* 325. Where the prosecutor had sent forty sacks of wheat to the prisoner, a warehouseman and wharfinger, for safe custody; and the prisoner emptied several of the sacks of the wheat contained in them, which he sold, and then substituted for it other wheat of an inferior quality: it was doubted at first whether, as the prisoner had appropriated to his own use the whole of the wheat in each of the sacks which he had emptied, he could be deemed guilty of larceny; but upon the question being referred to the judges, they were unanimously of opinion that the taking of the whole of the wheat out of the sack, was as much larceny as the taking of a part merely; and the prisoner had judgment accordingly. *R. v. Brazier*, *R. & Ry.* 337. In another case, upon an indictment against the captain of a ship for larceny, it appeared that the ship, laden with casks of butter, and bound from Waterford to Newhaven, put into Cowes on her way through stress of weather; most of the casks were stowed in

the hold, and battened down, but some were on deck; the prisoner had thirteen of those on deck landed at Cowes, pretending they were his own property; and when he arrived at Newhaven, he informed the consignees that these casks had been thrown overboard: the judges held that this was not larceny; but it seemed to be admitted at the trial, that if the prisoner had broken bulk, by taking the thirteen casks from those which were battened down, he must have been convicted.

R. v. Madox, R. & Ry. 92. Where the prosecutor sent three trusses of hay to another person, by the prisoner's cart, he delivered two only, and the other was found in his possession, not broken up: Parke, J., held this not to be larceny, as the truss had not been broken up. *R. v. Pratley, 5 Car. & P. 533.*

Where the prisoner was hired to take four bales of goods in his cart to C. D., which he never delivered, and some of the goods were found loose in the house of a third person,—but as there was no evidence that they had been taken from any of the bales whilst in possession of the prisoner, Patteson, J., directed him to be acquitted. *R. v. Fletcher, 4 Car. & P. 545.* The rule here mentioned as to carriers and other bailees, however, does not extend to their servants: if the servant of a carrier convert the property entrusted to him to his own use, he will be guilty of larceny, even in cases where a conversion by his master would be merely a breach of trust. Upon an indictment for stealing a quantity of barilla, it appeared that the prosecutors employed one Bryant, a master carman, to cart some barilla for them from the London docks, and Bryant sent Harding his carter for it; Harding, in collusion with others, whilst on his way from the docks with a cart load of the barilla, allowed the others to take away the whole of it, together with the cart, horses, &c.: some doubt being entertained whether, as the barilla was delivered to Harding to carry, he could be deemed guilty of larceny in converting it to his own use, the question was submitted to the judges; who were unanimously of opinion that this was larceny in the servant, and that it was immaterial whether the barilla was stated to be the property of the prosecutors or of Bryant. *R. v. Harding et al., R. & Ry. 125.*

So, after the bailment is determined, any taking by him who was bailee, with a felonious intent, will be larceny. If a carrier, after he has brought the goods to the place appointed, take them away again secretly, *animo furandi*, he is guilty of larceny; for his possession as bailee being determined, his second taking is the same as if he were a mere stranger. 1 *Hawk. c. 33, s. 11.* Where the prosecutor placed a mare with the prisoner, (who was a farrier and horse dealer living at Loddiswell, near Plymouth, for the purpose of selling her; the mare not being sold, the prosecutor went from Plymouth to Loddiswell, saw the prisoner, and said that he came to take

the mare away, but it appearing that the mare had received some injury from a fall, the prosecutor consented to its remaining with the prisoner a few days longer; on the next day, however, hearing something unfavourable of the prisoner, he went again with another person, and the prisoner not being at home, he left the other person there with directions to demand the mare, and he returned to Plymouth; upon the return of the prisoner, the person so left demanded the mare, but the prisoner refused to deliver her to him, but said that he would go to Plymouth and see the prosecutor himself, and they accordingly rode to Plymouth, the prisoner riding the mare, which he placed at a livery stable there; they then saw the prosecutor, who gave orders that the mare should be taken to a Mr. Eliot, who would keep her, and eventually buy her; the prisoner asked to be permitted to ride her to Eliot's, which was on his way home, but the prosecutor refused it, saying "I dare you ever to put a finger near that mare again," to which the prisoner replied "well," and the prosecutor sent his nephew to the livery stables, who desired the ostler not to let the prisoner have the mare again, as it was his uncle's; the prisoner afterwards, on the same day, went to the livery stables, and being told by the ostler the message he had received, said he had just left the party, and it was all right then, and he then ordered the mare to be brought out, mounted her, and rode off, and in a few days afterwards sold her: being indicted for larceny and convicted, the case was reserved for the criminal appeal court, where it was argued; and the judges held that the question in this case was, whether the possession was changed, so that trespass would lie for the second taking, in which case the taking *animo furandi*; would be larceny; if goods be allowed to remain in the possession of the bailee, after the bailment determined, he cannot be guilty of felony in disposing of them, for trover only and not trespass would lie for them: but if the possession be determined, or if a bailee open a bale or break bulk, as trespass in that case will lie, it is larceny if the taking be *animo furandi*; in this case the judges held that there was sufficient evidence of the possession being changed, and of the livery stable keeper having become the agent of the prosecutor for the custody of the mare, and that the conviction therefore was right. *R. v. Steer*, 2 Car. & K. 988.

But servants who have the bare charge or custody of the goods of their master, are not bailees, within the above rules as to larceny by bailees, for the possession of the servant is always deemed the possession of the master; and if he dispose of the goods to his own use, he is guilty of larceny. Therefore if a gentleman's butler, having the care and custody of his plate, or his shepherd of his sheep, embezzle them, they are as much guilty of larceny as if they took them out of the actual

custody of their master. 1 *Hale*, 506. 1 *Hawk. c. 33, s. 6*. So, if a carter go away with his master's cart, *Robinson's case*, 2 *East, P. C.* 565, or a porter with goods which his master sends by him to a customer, *Bass's case*, 2 *East, P. C.* 566, 1 *Leach*, 285, or a servant with money entrusted to him by his master to take to another person, *Lavender's case*, 2 *East, P. C.* 566, or a clerk with a bill of exchange, &c., delivered to him to send or take to a banker's, *R. v. Paradise*, 2 *East, P. C.* 565. *R. v. Chipchase*, 2 *East, P. C.* 567, 2 *Leach*, 805, or a clerk to a banker or merchant with money of which he has the care, or to which he has access, 1 *Hawk. c. 33, s. 7*, or the like; in all these cases the carter, porter, servant, or clerk, are respectively guilty of larceny, no matter at what time they first had the *animus furandi*, whether at the time of the delivery of the goods, &c., to them, or afterwards. But formerly, if a clerk or servant received money, chattel, or valuable security, for his master, which had never been in the master's possession, and instead of delivering it to his master, converted it to his own use,—this was not deemed larceny; but now by stat. 7 & 8 G. 4, c. 29, s. 47, “every such offender shall be deemed to have feloniously stolen the same from his master, although such chattel, money, or security, was not received into the possession of such master, otherwise than by the actual possession of his clerk, servant, or other person so employed.” So if a weaver or silk throwster deliver yarn or silk to be wrought by his journeyman in the house of the master, and the journeyman carry it away with intent to steal it, this is larceny, because in that case not only the property remains in the master, but the possession of the workman is his possession; but if the yarn or silk is to be wrought out of the house, and the journeyman embezzle it, it is not larceny, 2 *East, P. C.* 682, unless the journeyman had the felonious intent at the time he received it, as in other cases of bailment. But if a man give goods to another to carry, or the like, and he himself be present all the time, this is not a bailment, nor is the owner deemed to have parted with the possession of the goods; and if the person to whom such goods are entrusted, run away with them, he is guilty of larceny. See 2 *East*, 683, 684. So, persons who have the bare use of the goods of another, are not deemed in law bailees; therefore if a guest at an inn or tavern steal the plate or other articles of which he has the use at his meals, &c., he is guilty of larceny, for he is said to have the use merely of them, and not the possession. 1 *Hale*, 506. 1 *Hawk. c. 33, s. 6*.

And lastly, if a man lose goods, and another find them, and appropriate them to his own use, it is a larceny or not according to circumstances. Where a man was indicted for stealing a bank note, and it appeared that he found it upon the road, but as there was no name or mark upon it indicating to

whom it belonged, nor were there any circumstances attending the finding which would enable him to discover to whom it belonged, and as he had no reason to believe that the owner knew where to find it, the prisoner intended to appropriate it to his own use; on the day after, however, he was informed that it belonged to the prosecutor, who had dropped it accidentally; and afterwards he changed the note, and appropriated the money to his own use: the prisoner being found guilty, the case was reserved for the opinion of the criminal court of appeal; the case was not argued, but after grave consideration, a most elaborate judgment was delivered by Parke, B.: after citing numerous authorities, his lordship said,—“the result of these authorities is, that the rule of law on this subject seems to be, that if a man find goods that have been actually lost, or are reasonably supposed by him to have been lost, and appropriate them with intent to take the entire dominion over them, really believing, when he takes them, that the owner cannot be found, it is not larceny; but if he have taken them with a like intent, though lost or reasonably supposed to be lost, but reasonably believing that the owner can be found, it is larceny;” here “the first taking did not amount to larceny, because the note was really lost, and there was no mark on it or other circumstance to indicate then who was the owner or that he might be found, nor any evidence to rebut the presumption that would arise from the finding of the note as proved, that he believed the owner could not be found, and therefore the original taking was not felonious; and if the prisoner had changed the note or otherwise disposed of it before notice of the title of the real owner, he clearly would not have been punishable; but after the prisoner was in possession of the note the owner became known to him, and he then appropriated it *animo furandi*, and the point to be decided is, whether that was a felony; upon this question we have felt considerable doubt; if he had taken the chattel innocently, and afterwards appropriated it without knowledge of the ownership, it would not have been larceny, nor would it, we think, if he had done so, knowing who was the owner, for he had the lawful possession in both cases, and the conversion would not be a trespass in either; but here the original taking was not innocent, in one sense, and the question is, does that make a difference? we think not; it was punishable as we have clearly decided; and although the possession was accompanied by a dishonest intent, it was still a lawful possession, and good against all but the real owner, and the subsequent conversion was not therefore a trespass in this case more than the others, and consequently no larceny; we therefore think the conviction was wrong.” *R. v. Thurborn*, 2 Car. & K. 831. From this decision, which may be considered a safe guide in all these cases hereafter, it appears that a taking, by

finding, in larceny, may be classed under three heads :—*First*, where upon the finding, the party has no intention to appropriate the thing found to his own use, but on the contrary intends to restore it to the owner if he be found, but afterwards he disposes of it to his own use, either before or even after he knows who the owner is, this is not larceny because there was no *animus furandi* at the time of the taking ; see *ante*, p. 381 :—*Secondly*, where a man finds goods that have been actually lost, or are reasonably supposed by him to have been lost, and appropriates them with intent to take the entire dominion over them, really believing then that the owner cannot be found, and he afterwards dispose of them to his own use, either before, or even after, he knows who the owner is, it is not larceny, because the taking, though not exactly innocent, was not punishable, and could not be made the subject of an action of trespass : *Thurborn's case, supra* :—*Thirdly*, where a man finds goods that have been actually lost, or are reasonably supposed by him to be lost, and appropriates them with intent to take the entire dominion over them, he at the same time knowing, or reasonably believing that the owner can be found, this is larceny, whether the finder afterwards convert them to his own use or not. *Id.* Where a gentleman left his trunk in a hackney coach, and the coachman converted it to his own use, this was holden larceny, because he knew where he had taken the gentleman up and set him down. *Lamb's case, 2 East, P. C. 664.* Where the prisoner, a hackney coachman, was indicted for stealing a box, containing several articles, it appeared that he conveyed the prosecutor, with a number of packages, from the Adelphi to Orchard-street, where he and a servant took all the packages out, except this box which was under the seat, and being paid his fare he drove off; the prisoner being traced and taken, and the box (by a direction from him) found at a Jew's unrecorded, some of the goods taken out, and several papers, particularly two bonds, missing : the jury convicted him, and the majority of the judges held the conviction to be right. *Wynne's case, 2 East, P. C. 664, 1 Leach, 460.* Where the prosecutor had his hat knocked off in the street, and the prisoner, who had his own hat on his head, took the hat up and went home with it : this was holden to be larceny, for the prisoner either saw, or could have instantly found, the owner. *R. v. Pope, 6 Car. & P. 346.* Where a female servant was indicted for stealing some bank notes in her master's dwelling-house, and it appeared that being questioned about them, she at first denied all knowledge of them, but afterwards said she had found them in the passage of the house : Park, J., held that her not having communicated the fact immediately, to her master, and ascertained whether they were his, were strong evidence of her felonious intent. *R. v. Kerr, 8 Car. & P. 176.*

Where a man purchased a bureau at a public auction, and afterwards found some money in a secret drawer of it, which he appropriated to his own use : this would have been larceny, inasmuch as he had the means of immediately finding out the owner ; but he proved that the auctioneer at the time of the sale said he sold the bureau "with its contents," and the court held that if that were true, it would give him a colourable claim of right, which would prevent the appropriation of the money from being larceny. *Merry v. Green et al.*, 10 *Law J.* 154 *m.* 7 *Mees. & W.* 623. Where the prisoner was indicted for stealing a gold chain and eye-glass, and it appeared that the prosecutor's wife lost the articles, whilst walking in the garden adjoining the house, and the prisoner (who was engaged about the premises), and the gardener, were sent to look for them ; the prisoner found them, and, without disclosing the fact to the gardener or other person, took them home ; on the day after a reward of 2*l.* was offered for them, when the prisoner came forward with them, but refused to give them up until the reward was paid : Rolfe, B., held this to be larceny. *R. v. Peters*, 1 *Car. & K.* 245. But where upon an indictment for stealing a watch, the jury found the defendant "not guilty of stealing the watch, but guilty of keeping possession of it in the hope of reward, from the time he first had the watch : " the question whether his thus keeping it was larceny, being reserved for the opinion of the criminal appeal court, the judges held that it was not. *R. v. Yorke*, 2 *Car. & K.* 841. So, where a man was indicted for stealing a purse with money in it, and it appeared that he found it in the high road, and, according to his own confession, he poured the money into his hand, threw the purse away, and applied the money to his own use ; the purse had been lost by the prosecutor's wife, when going as a passenger by the coach from Cleobury to Bewdley : Parke, B., held that although it was clear that the defendant had the intent to appropriate the money to his own use immediately on his finding it, yet as there were no marks on the purse by which he might trace the owner, and as he found it in a place where it might be presumed that the owner would not know it could be found, he was not guilty of larceny. *R. v. Mole*, 1 *Car. & K.* 417. See *R. v. Reed et ux.*, *Car. & M.* 306. See *Thurborn's case*, *ante*, p. 388.

3. *Identity of the goods and ownership.*] If the goods stolen have been found, they ought to be produced, and identified as the property stolen. They ought also to be proved to be the property of the prosecutor, as mentioned in the indictment, or that they were in his possession as bailee. Where the stealing has been from a bailee, it is in general necessary that the bailee should appear as a witness, to prove that he did not give the prisoner leave to take the goods. See *R. v. Yend*

and Haines, 6 Car. & P. 176, *ante*, p. 370. And when stolen from the owner, it is prudent at least, in most cases, that he should attend as a witness, for the same reason, whether he were examined before a magistrate or not. If the goods have been stolen from a thief, they may be laid and proved to the property of the real owner. 1 Hawk. c. 43, s. 13. If there be any variance between the proof and the indictment as to the ownership, however, the court may order the indictment to be amended. 14 & 15 Vict. c. 100, s. 1.

2. *Larceny of Valuable Securities, &c.*

Stealing Securities for the Payment of Money.

Indictment.

— } The jurors for our Lady the Queen, upon their
to wit. } oath present, that A. B., on the — day of —,
in the year of our Lord —, feloniously did steal, take, and
carry away [one bill of exchange for the payment of —, one
promissory note for the payment of —, and one order for
the payment of money, to wit, for the payment of —, the
property of C. D., the said several sums of money payable
and secured by and upon the said bill, note and order respec-
tively, being then due and unsatisfied to the said C. D. : against
the form of the statute in such case made and provided, and
against the peace of our Lady the Queen, her crown and
dignity.

Felony, punishable as if it were a chattel of the same value. See 7 & 8 G. 4, c. 29, s. 5, infra.

By stat. 14 & 15 Vict. c. 100, s. 5, in an indictment for stealing "any instrument," it shall be sufficient to describe such instrument by any name or designation by which the same may be usually known, or by the purport thereof, without setting out any copy or fac-simile thereof, or otherwise describing the same or the value thereof. From this it would seem sufficient to describe the securities mentioned in the indictment as "one bill of exchange," "one promissory note," or "one order for the payment of money," without stating the amount, &c. But this I fear is not so. By stat. 7 & 8 G. 4, c. 29, s. 5, (being the section on which this indictment is framed) if any person shall steal any tally, order, or other security whatsoever, entitling or evidencing the title of any person or body corporate to any share or interest in any public stock or fund, whether of this kingdom or of Great Britain or of Ireland, or of any foreign state, or in any fund of any body corporate, company, or society, or to

*any deposit in any savings' bank—or shall steal any debenture, deed, bond, bill, note, warrant, order or other security whatsoever for money or for the payment of money, whether of this kingdom or of any foreign state,—or shall steal any warrant or order for the delivery or transfer of any goods or valuable thing: every such offender shall be deemed guilty of felony, of the same nature and in the same degree and punishable in the same manner, as if he had stolen any chattel of the like value with the share, interest, or deposit to which the security so stolen may relate,—or with the money due on the security so stolen, or secured thereby and remaining unsatisfied,—or with the value of the goods or other valuable thing mentioned in the warrant or order: and each of the several documents hereinbefore enumerated, shall throughout this Act be deemed for every purpose to be included under and denoted by the words "valuable security." So that to show that the stealing of a bill, note or cheque is punishable within this Act, it is necessary to show that some amount of money is due upon it, or secured by it and remaining unsatisfied. And that is not done by merely stating it to be a bond, bill of exchange, promissory note, or order for money or the payment of money, for it may have been paid. See *R. v. Clarke*, *infra*.*

A note of the bank of England or other bank may be described as "money;" 14 & 15 Vict. c. 100, s. 18, ante, p. 90; but then it should seem that the indictment must conclude "contra formam statuti," for stealing such a note was no offence at common law. 1 Hawk. c. 33, s. 35.

Evidence.

To maintain this indictment, the prosecutor must prove—

1. A larceny of the bill, note, or order, as in ordinary cases of simple larceny at common law, *see ante* p. 371, 369. Upon an indictment for stealing a certain warrant for the payment of 22,000*l.*, and bank notes to the same amount, it appeared that Sir Thomas Plomer, the prosecutor, had given a cheque upon his banker for 22,000*l.* to Walsh, the prisoner, for the purpose of purchasing exchequer bills for him to that amount; the prisoner received the amount of the cheque in bank notes, and absconded with them; but being apprehended and tried, the jury, being of opinion that the prisoner before he received the cheque, had formed the design of converting the money to his own use, found him guilty: but upon a reference of the case to the judges, they were of opinion that this was not a larceny;—not of the cheque, because the prisoner had used no fraud or contrivance to induce the prosecutor to give it to him, and also because, being the prosecutor's own cheque, and of no

value in his hands, it could not be called his goods and chattels ;—nor was it a larceny of the notes obtained by the cheque, for the prosecutor never had possession of them but by the hands of the prisoner. *R. v. Benjamin Walsh*, *R. & R.* 216. But in a more recent case, where the prisoner's master gave him a cheque upon his banker, to pay to a creditor, and the prisoner instead of doing so, applied it to his own use : being indicted for stealing the cheque, he was found guilty ; and the judges held the conviction to be right. *R. v. Metcalfe*, *Ry. & M.* 433. *R. v. Heath*, 2 *Mood.* 38. Where a prisoner was indicted for stealing a cheque of the prosecutor, and in one count it was described as an order for the payment of 13*l.* 9*s.* 7*d.*, and in another as "one piece of paper of the value of one penny ;" and it was objected that the cheque being issued at a greater distance than fifteen miles from the banker's, was not a valuable security by stat. 55 G. 3, c. 184, and therefore the prisoner could not be convicted ; but the judges at the criminal appeal court held that at all events he could be convicted on the second count, for stealing the piece of paper. *R. v. Perry*, 1 *Car. & K.* 725. See *R. v. Yates*, *Ry. & M.* 170. *R. v. Frampton*, 2 *Car. & K.* 47. *R. v. Rodway*, 9 *Car. & P.* 784. So, where country bank notes, which were paid by the agent in London, were sent by him to the country bankers, by whom they were to be re-issued ; on their way they were stolen by the prisoner ; being apprehended and indicted, (the first count of the indictment stating the notes to be bank notes in the ordinary form, and the second, as certain pieces of paper with valuable stamps upon them :) the judges seemed to be of opinion that this could not be deemed a stealing of the notes, as it could not be said that the sums payable and secured thereby, were due and unsatisfied to the prosecutors ; but they held that the prisoner was rightly convicted of stealing the paper and stamps. *R. v. Clarke*, *R. & Ry.* 181. *R. v. Vyse*, *Ry. & M.* 218, *S. P.* But in another case, where it appeared that the prosecutor, in answer to an advertisement offering an advance of money upon loan, sent a letter to the address therein mentioned, stating his wish to borrow 5,000*l.*, and the prisoner called upon him in consequence of it ; the prisoner offered to obtain the loan for him, upon his acceptance of ten bills of exchange for 500*l.* each, and he produced ten 6*s.* stamps, which the prosecutor accepted in blank, and which the prisoner took away with him, and afterwards had bills drawn upon them for 500*l.* each, by a person in concert with him of the name of Clipold : he was afterwards indicted for this, as for a larceny of ten bills of exchange for 500*l.* each, of ten pieces of paper, each stamped with a 6*s.* stamp, and of ten pieces of paper, with the words "accepted F. Dugdale Astley, payable at Messrs. Praed & Co., 189, Fleet-street, London," upon each : Littledale and Bosanquet, JJ., and Bolland, B., held that the prisoner could not be convicted

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upon this evidence ; when these acceptances were obtained by him, they were not bills of exchange, orders or securities for money, neither drawer's name, sum, or date being upon them, and of course they were of no precise or definite value ; nor could the prisoner be convicted on those counts which described the acceptances as ten pieces of paper with stamps on them, &c., because the stamps never belonged to the prosecutor, but to the prisoner. *R. v. Minter Hart*, 6 Car. & P. 106. But in all cases where there is a doubt whether the instrument stolen was at the time a valuable security within the meaning of the Act, and the paper on which it is written or printed is the property of the prosecutor, it will be prudent to add a count for stealing "one piece of paper of the goods and chattels of the said C. D.," as for a larceny at common law, as in *Perry's case*, *ante*, p. 393.

2. It must appear that the bill, note, or order was such as is mentioned in the indictment. If it be in the possession of the prosecutor, it should be produced, but there is no necessity to prove it ; but if it be not in his possession, he may give secondary evidence of it, without giving the defendant notice to produce it. *See ante*, p. 137. If produced, it must appear to be duly stamped, for otherwise it is not a valuable security within the meaning of the Act. *R. v. Yates*, Ry. & M. 170. *And see R. v. Perry*, *ante*, p. 393. And it must be proved that something remains due and unsatisfied to the prosecutor upon it. *See ante*, p. 392.

Where the indictment is for stealing "money," you may give in evidence the stealing of any note of the Bank of England or other bank, and it will support the indictment. 14 & 15 Vict. c. 100, s. 18, *ante*, p. 90.

If there be a count at common law, as for stealing a piece of paper, as in *Perry's case*, it must appear in evidence to have been the property of the prosecutor. *See Minter Hart's case*, *supra*.

Stealing Writings relating to real Estate.

Indictment.

— } The jurors for our Lady the Queen, upon their
to wit. } oath present, that A. B., on the — day of —,
in the year of our Lord —, unlawfully did steal, take, and
carry away, a certain deed of [grant] the property of C. D.,
the said deed being then evidence of [part of] the title of the
said C. D. to a certain real estate called —, in which
real estate the said C. D. then had and still hath a present

interest: against the form of the statute in such case made and provided, and against the peace of our Lady the Queen, her crown and dignity. [*The instrument may be described by any name, by which it is usually known.* 14 & 15 Vict. c. 100, s. 5. *In the indictment, it is sufficient to allege the thing stolen to be evidence of the title, or of part of the title, of the person, or of some one of the persons, having a present interest, whether legal or equitable, in the real estate to which the same relates, and to mention such real estate or some part thereof: and it shall not be necessary to allege the thing stolen to be of any value.* 7 & 8 G. 4, c. 29, s. 23.

Misdemeanor; transportation for seven years;— or such other punishment by fine or imprisonment [with or without hard labour, s. 4], or both, as the court shall award. 7 & 8 G. 4, c. 29, ss. 23, 21.

Evidence.

To maintain this indictment, the prosecutor must prove—

1. A larceny of the deed or instrument mentioned in the indictment, as in ordinary cases. *See ante*, pp. 371, 369.

2. That it was evidence of [part of] the title of C. D.'s real estate mentioned in the indictment. This may be done by putting the deed itself in evidence, if it be in possession of the prosecutor; or if not, then by giving secondary evidence of its contents, which may be done without giving the defendant notice to produce it. *Ante*, p. 137. And evidence must then be given, showing how the prosecutor claims the estate, so as to show that the deed in question is evidence of his title.

3. That C. D., at the time of the larceny, had a present interest in the estate, to which the deed relates. The statute says, a "present" interest, which I understand to mean possession or perception of the rents or profits, or the immediate right thereto, either in the prosecutor or his trustee, in contradistinction to an estate in remainder, &c.

But by stat. 7 & 8 G. 4, c. 29, s. 24, no person shall be liable to be convicted of the above offence by any evidence whatever, in respect of any act done by him, if he shall previously to his being indicted have disclosed such act on oath, in consequence of any compulsory process of any court of law or equity, in any action, suit, or proceeding which shall have

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been *bonâ fide* instituted by any party aggrieved, or if he shall have disclosed the same in any examination or deposition before any commissioners of bankrupt.

Stealing, destroying, or concealing a Will.

Indictment.

— } The jurors for our Lady the Queen upon their
to wit. } oath present, that A. B., on the — day of —,
in the year of our Lord —, unlawfully did steal, take, and
carry away [*“steal, or for any fraudulent purpose destroy
or conceal”*] a certain will of one C. D. [*“will, codicil, or
other testamentary instrument”*]: against the form of the
statute in such case made and provided, and against the
peace of our Lady the Queen, her crown and dignity. [*It is
not necessary in the indictment to allege that the will, &c.,
is the property of any person, or of any value. 7 & 8 G. 4,
c. 29, s. 22. But if the indictment be for destroying or con-
cealing the will, the fraudulent purpose should be set out.
R. v. Morris, 9 Car. & P. 89.*

*Misdemeanor ; transportation for seven years ;—or such
other punishment by fine or imprisonment [with or without
hard labour, s. 4] or both, as the court shall award. 7 & 8
G. 4, c. 29, s. 22.*

Evidence.

To maintain this indictment, the prosecutor must prove a larceny of the will, as in ordinary cases. *See ante*, pp. 371, 369. Or if the indictment be for destroying or concealing the will, prove the destruction or concealment, and prove circumstances from which the jury may infer that it was done for a fraudulent purpose. It is immaterial, in either case, whether the will related to real or personal estate, or to both, or whether it was stolen, &c., during the life time or after the death of the testator.

By stat. 7 & 8 G. 4, c. 29, s. 24, no person shall be liable to be convicted of the above offence, by any evidence whatever, in respect of any act done by him, if he shall previously to his being indicted have disclosed such act on oath, in consequence of any compulsory process of any court of law or equity, in any action, suit, or proceeding which shall have been *bonâ fide* instituted by any party aggrieved, or if he shall have disclosed the same in any examination or deposition before any commissioners of bankrupt.

Stealing, obliterating, or destroying a Record, &c.

Indictment.

— } The jurors for our Lady the Queen, upon their
to wit. } oath present, that A. B., on the — day of —,
in the year of our Lord —, unlawfully did steal, take and
carry away [*“If any person shall steal,—or shall for any
fraudulent purpose take from its place of deposit for the
time being, or from any person having the lawful custody
thereof,—or shall unlawfully and maliciously obliterate,
injure, or destroy”*] a certain record and judgment roll,
[*“any record, writ, return, panel, process, interrogatory,
deposition, affidavit, rule, order, or warrant of attorney, or
any original document whatsoever, of or belonging to any
court of record, or relating to any matter civil or criminal,
begun, depending or terminated in any such court,”—“or
any bill, answer, interrogatory, deposition, affidavit, order,
or decree, or any original document whatsoever, of or belong-
ing to any court of equity, or relating to any cause or matter
begun, depending, or terminated in any such court”*]:
against the form of the statute in such case made and pro-
vided, and against the peace of our Lady the Queen, her
crown and dignity. [*The instrument may be described by
any name by which it is usually known. 14 & 15 Vict. c. 100,
s. 5. It is not necessary to allege that the article in respect
of which the offence was committed, was the property of any
person, or of any value. 7 & 8 G. 4, c. 29, s. 21.*

*Misdemeanor ; transportation for seven years ;—or such
other punishment by fine or imprisonment [with or without
hard labour, s. 4] or both, as the court shall award. 7 & 8
G. 4, c. 29, s. 21.*

Evidence.

To maintain this indictment, the prosecutor must prove a larceny of the record, &c., as in ordinary cases. Before this statute, upon an indictment for stealing one roll of parchment, being a record of the court of Common Pleas, the judges held that as the record in question did not concern the realty, stealing the parchment on which it was written was larceny, and a felony. *R. v. Walker, Ry. & M. 155.*

3. Stealing Cattle or other Animals.*Stealing Horses, Cattle, or Sheep.**Indictment.*

— } The jurors for our Lady the Queen, upon their
to wit. } oath present, that A. B., on the — day of —,
in the year of our Lord —, feloniously did steal, take, and
lead away one gelding [*“horse, mare, gelding, colt, or filly,
—bull, cow, ox, heifer, or calf,—ram, ewe, sheep, or lamb”*]
of the goods and chattels of C. D.: against the form of the
statute in such case made and provided, and against the peace
of our Lady the Queen, her crown and dignity. [*In stealing
cattle or sheep, the words are “did steal, take, and drive
away.”* Ante, p. 355.

Felony; 7 & 8 G. 4, c. 29, s. 25; *transportation for not
more than fifteen years, nor less than ten*;—*or imprisonment,
with or without hard labour, for not more than three years,
—the imprisonment solitary for not more than a month at a
time, nor for more than three months in a year.* 1 Vict. c. 90,
ss. 1, 3. *As to costs, see ante, p. 186; costs of apprehen-
sion, ante, p. 189.*

Evidence.

To maintain this indictment the prosecutor must prove—

1. The stealing of the gelding, as in larceny in ordinary cases. See ante, pp. 371, 369. Where upon an indictment for stealing a mare, it appeared that the prisoner went to an inn on a fair day, and desired the ostler to bring out his horse; the ostler saying that he did not know it, the prisoner went with him to the stable, and pointed to the mare in question, saying that is my horse and desiring the ostler to saddle it: the ostler did so, and the prisoner attempted to mount, but the mare being frightened at some noise, would not stand still; the prisoner then desired the ostler to lead the mare out of the yard, and the ostler did so, and just as the prisoner was about to mount her, a person who knew the mare came up, and the prisoner was secured: Garrow, B., held this to be sufficient to constitute the felony. *R. v. Pitman*, 2 Car. & P. 423. See ante, p. 379. But where upon an indictment for stealing two horses, it appeared that the prisoners took the horses out of the prosecutor's stables, rode them about thirty miles and then left them at an inn, saying they would be back in three hours, and desiring that the horses should be taken care of; and the prisoners were afterwards taken

on the same day about fourteen miles distant from the inn, and walking in a direction from it: the jury found that the prisoners took the horses merely for the purpose of riding them the thirty miles, and that they left them at the inn without intending to come back for them or dispose of them; and ten of the judges held this not to be larceny. *R. v. Phillips et al.*, 2 East, P. C. 662, *see ante*, p. 366. But where upon an indictment for horse stealing, it appeared that the horse in question had before been stolen by one Haworth, who was about to be tried for the offence; and the prisoner, in order (as he thought) to screen Haworth from conviction, clandestinely took the horse out of the prosecutor's stable, led him to a coal pit and backed him into it, and the horse was killed: it was objected at the trial that this was not a larceny, because the thing appeared not to have been done with intention to convert the horse to the use of the taker *animo furandi et lucri causâ*; but seven of the judges held it to be larceny; and six of this majority held, that to constitute larceny, it is not essential that the taking shall be *lucri causâ*, if it be fraudulent and with intent wholly to deprive the owner of the property, it is sufficient. *R. v. Cabbage, R. & Ry.* 292. Where upon a trial for stealing a horse, the prosecutor stated that he had agisted the horse on the land of another at some distance, and that hearing from that person of the loss of the horse, he went to the field where the horse had been put to feed, and discovered he was gone; but neither the agister nor his servant was called as a witness: Gurney, B., held that this was not sufficient evidence of the loss of the horse, for it was consistent with all this that the prisoner might have obtained the horse honestly from the agister, and not by felony. *R. v. Yend and Haines*, 6 Car. & P. 176.

Where, upon an indictment for stealing a sheep, it appeared that the prisoner removed the sheep from the middle of the field where it was grazing, to the gripe of a ditch, and there killed it, and stole a part of the carcass: the judges held that this removal of the sheep for the purpose of killing it, was not such a taking and carrying away as would constitute a stealing of the sheep. *R. v. Williams, Ry. & M.* 107.

2. That the horse or other animal stolen, was such as is described in the indictment. Where the animal is specifically mentioned in the statute, a description of it by any other name in the indictment will be bad, even although the name used be a generic name for the animal. Upon a former statute against horse stealing, where the words were "horse, gelding, or mare," it was holden that evidence of stealing a colt, or filly, or foal, would support an indictment for stealing a horse, gelding, or mare, respectively; *R. v. Welland, R. & Ry.* 494; but an indictment for stealing a colt, not saying whether it was a horse or a mare, was holden by the judges

to be insufficient upon that statute. *R. v. Beany, R. & Ry.* 416. In analogy to these cases, evidence of stealing a foal, would support an indictment on the present statute for stealing a colt or filly; but evidence of stealing a colt or filly, would not support an indictment for stealing a horse, gelding, or mare, because "colt" and "filly" are specifically mentioned in the statute. So, an indictment for stealing a foal, without saying whether it was a colt foal or filly foal, would be bad as an indictment on the statute.

As to cattle, the words in the Act are, "bull, cow, ox, heifer, or calf;" and evidence of any one, will not support an indictment for stealing any of the others, because they are specifically mentioned. Therefore where, upon an indictment for stealing a cow, it appeared that it was only two years old and never had a calf, and it was proved to be a heifer, the judges held the variance to be fatal. *R. v. Cook, 1 Leach,* 105.

As to sheep, the words of the Act are "ram, ewe, sheep, or lamb." The word "sheep" is a generic term, comprehending the others: but it will not be a good description of a ram, ewe, or lamb, because those are specifically mentioned in the Act. And therefore where, upon an indictment for stealing a sheep, it appeared in evidence that it was an ewe, the judges held that the evidence did not support the indictment, as the statute mentions both ewes and sheep. *R. v. Puddifoot, Ry. & M.* 247. So, where upon an indictment for stealing five sheep, it appeared in evidence that they were lambs, the judges held that the evidence did not support the indictment, for the same reason. *R. v. Loom et al., Ry. & M.* 169. *R. v. Birket, 4 Car. & P.* 216, *S. P.* But the word "sheep" may be considered descriptive of wethers, rig sheep, *R. v. Stroud, 6 Car. & P.* 535, and of every other description of sheep, not coming within the terms of ram, ewe, or lamb; and in practice they are usually described as "one wether sheep, and one other sheep," and the like. So, sheep is deemed a sufficient description, where the animal is of that equivocal age, as to be too old to be called a lamb, and too young to be called a ram or ewe. And therefore where a man was indicted for stealing "one sheep," and it appeared that the animal was between nine and twelve months old, and some of the witnesses called it a sheep, some a lamb, but the jury said that in common parlance it was called a lamb: the prisoner being convicted, the judges held the conviction to be right, as the word "sheep" being general, was applicable to one of that age, whatever in common parlance it might be called. *R. v. Spence, 1 Car. & K.* 699. So, where out of a flock of ewes and wethers one was stolen, but it could not be ascertained whether it was a ewe or a wether, and it was described in the indictment as a sheep, a majority of the judges held it to be sufficient. *R. v. M'Cully, 2 Moody,* 34.

The section of the statute on which the above indictment is

***Killing Cattle or Sheep, with Intent to Steal.* 401**

drawn, must be understood as extending only to the stealing of cattle which are alive: stealing a dead sheep, &c., is but simple larceny at common law, and the indictment should either state it to be dead, or describe it as so much mutton, &c.

Killing Cattle or Sheep, with intent to Steal the Carcase.

Indictment.

— } The jurors for our Lady the Queen, upon their
to wit. } oath present, that A. B., on the — day of —,
in the year of our Lord —, wilfully and feloniously did kill
one ewe [*“horse, mare, gelding, colt, or filly,—bull, cow, ox,
heifer, or calf,—ram, ewe, sheep, or lamb”*] of the goods and
chattels of C. D., with intent then feloniously to steal, take,
and carry away the carcase [*or the skin, or a certain part of
the carcase, that is to say, the inward fat*] of the said ewe, so
killed as aforesaid: against the form of the statute in such
case made and provided, and against the peace of our Lady
the Queen, her crown and dignity.

*Felony; 7 & 8 G. 4, c. 29, s. 25; transportation for not
more than fifteen years, nor less than ten;—or imprisonment,
with or without hard labour, for not more than three years,
—the imprisonment solitary for not more than one month
at a time, or three months in a year. 1 Vict. c. 9(), ss. 1, 3.*

Evidence.

To maintain this indictment, the prosecutor must prove—

1. The killing of the sheep, &c., as stated in the indictment. Where upon an indictment for killing a lamb, with intent to steal part of the carcase, it appeared that the prisoner cut the leg off a lamb, whilst it was alive, and carried the leg away, but the lamb afterwards died of the wound: the judge at the trial being of opinion that as the death wound was given before the theft, the offence was made out, the prisoner was convicted, and the judges afterwards held the conviction to be right. *R. v. Clay, R. & Ry.* 387. So, where a man cut the throat of an ewe, with intent to steal the carcase, but was interrupted before he actually killed it, and it afterwards lived for two days: being convicted upon this statute, the judges held the conviction to be right. *R. v. Sutton*, 8 *Car. & P.* 281.

2. That the animal killed, is such as is described in the indictment, as in the last case.

3. The intent to steal the carcase, or part of it. This can only be proved from the admissions or acts of the defendant or from evidence of other facts from which the jury may fairly infer it. If he actually stole the whole or part of the carcase, this perhaps is the best proof of his intent to steal it. Even his killing the sheep, if he were interrupted before he could take any part of it away, would of itself be evidence from which the jury might fairly presume an intent to steal it. See *R. v. Sutton, supra*. But if he killed the sheep, and then voluntarily left it, this would be proof, not of this offence, but of another, namely, the malicious killing, maiming, or wounding cattle, which shall be mentioned hereafter. Where a prisoner was indicted for killing three sheep with intent to steal the whole of the carcasses, and it appeared that he only stole the tallow and inside fat of the three, and the fat of the backs of two of them : being convicted, the judges held the evidence sufficient, as the statute meant to make it immaterial whether the intent was to steal the whole of the carcase or a part only. *R. v. Williams, Ry. & M.* 107.

Hunting or stealing Deer in inclosed Places.

Indictment.

— } The jurors for our Lady the Queen, upon their
to wit. } oath present, that A. B., on the — day of —,
in the year of our Lord —, in certain inclosed land of C. D. .
situate in the parish of —, in the county of —, wherein
deer had been and then were usually kept [*“in the inclosed
part of any forest, chase, or purlieu, or in any inclosed
land wherein deer shall be usually kept”*] unlawfully, wil-
fully, and feloniously did course, kill, take, and carry away
[*“course, hunt, snare, or carry away, or kill or wound, or
attempt to kill or wound”*] one fallow deer, [*“any deer,”*]
the property of the said C. D., in the said inclosed land then
kept and being : against the form of the statute in such case
made and provided, and against the peace of our Lady the
Queen, her crown and dignity.

*Felony ; same punishment as for simple larceny ; 7 & 8
G. 4, c. 29, s. 26 ; that is, imprisonment, with or without
hard labour, for not more than two years, (and the impri-
sonment solitary for the whole or any part of the time) and
if a male, to be once, twice, or thrice publicly or privately
whipped, if the court shall think fit. See ante, p. 355.*

Evidence.

To maintain this indictment, the prosecutor must prove—

1. The coursing, killing, or stealing the deer, as stated in the indictment.

2. That it was committed in land belonging to or in the occupation of C. D.; that the land is in the parish, &c., stated in the indictment; that it is inclosed; and that deer have been and then were usually kept in it.

As to beating or wounding deer-keepers in the exercise of their duty, *see stat. 7 & 8 G. 4, c. 29, s. 29.*

Hunting or stealing Deer in uninclosed Places.

Indictment.

— } The jurors for our Lady the Queen, upon their
to wit. } oath present, that A. B., on the — day of —,
in the year of our Lord —, was duly convicted before
J. P., Esquire, one of Her Majesty's justices of the peace for
the county of —, for that he the said A. B. on [*&c., stating
the conviction, as thus:—on —, in a certain uninclosed
part of a certain forest called —, in the parish of —, in
the county of —, did unlawfully and wilfully course, kill,
and carry away one fallow deer, then in the said uninclosed
part of the said forest kept and being; and the said J. P.
then adjudged the said A. B., for his said offence, to forfeit and
pay the sum of —, to be paid and applied according to
law, and also to pay to C. D., the sum of — for his costs
in that behalf; and if the said sums should not be paid forth-
with, the said J. P. thereby then adjudged the said A. B. to be
imprisoned in the house of correction at —, in the said
county, for the space of — calendar months, unless the said
several sums should be sooner paid.] And the jurors afore-
said upon their oath aforesaid do further present, that the said
A. B., being so convicted as aforesaid, afterwards on the —
day of —, in the year —, in a certain other uninclosed
part of the said forest, situate as aforesaid, unlawfully, wil-
fully, and feloniously did course, kill, and carry away [*“course,
hunt, snare, or carry away, or kill or wound, or attempt to
kill or wound”*] one other fallow deer [*“any deer”*] then
in the said last-mentioned uninclosed part of the said forest
kept and being: against the form of the statute in such case
made and provided, and against the peace of our Lady the
Queen, her crown and dignity.*

*Felony; same punishment as for simple larceny; 7 & 8
G. 4, c. 29, s. 26; that is, imprisonment, with or without
hard labour for not more than two years, (and the imprison-
ment solitary for the whole or any part of the time), and if*

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a male, to be once, twice, or thrice publicly or privately whipped, if the court shall think fit. See ante, p. 355.

Evidence.

To maintain this indictment, the prosecutor must—

1. Produce and prove the conviction for the former offence, or prove it by an examined copy, and give some evidence of the identity of the prisoner. The prisoner may take objections to the validity of the conviction; and if he show it to be invalid, he cannot be convicted on the indictment. *R. v. Allen, R. & Ry.* 513. Where it was objected that the conviction stated no county where the offence was committed, but it appeared that in the latter part of the conviction, it directed the penalty to be paid to the overseers of the poor of the parish of D., in the county of Oxford “where the said offence was committed,”—Parke, J., held it to be sufficient. *R. v. Weale, 5 Car. & P.* 135.

2. He must prove the coursing, killing, or stealing of the second deer, as stated in the indictment. *See R. v. King, 1 Dow. & Lo.* 13 *Law J.* 43 *m.*

3. That the offence was committed in the uninclosed part of the forest, &c., mentioned in the indictment; and the parish, &c.

Taking or killing Conies or Hares by Night in Warrens, &c.

Indictment.

— } The jurors for our Lady the Queen, upon their
to wit. } oath present, that A. B., on the — day of —,
in the year of our Lord —, in the night time, to wit, about
the hour of eleven of the night of the same day, in a certain
warren and ground of C. D., in the parish of —, in the
county of —, then lawfully used for the breeding and keep-
ing of conies [*or hares*], unlawfully and wilfully did take
[and kill] three conies [*or hares*]: against the form of the
statute in such case made and provided, and against the
peace of our Lady the Queen, her crown and dignity.

*Misdemeanor; 7 & 8 G. 4, c. 29, s. 30; fine or imprison-
ment, or both; the imprisonment to be with or without
hard labour, and the whole or any part of it solitary, as the
court shall think fit. Id. s. 4.*

Evidence.

To maintain this indictment, the prosecutor must prove—

1. That the defendant took and killed the conies, as mentioned in the indictment. Where it appeared that the prisoner set several wires in a warren, for the purpose of catching rabbits, and a rabbit was caught in one of them; the prisoner afterwards came to the warren, and just as he was about to take up the rabbit, the warrener seized him; the judges held that the catching by a snare was a taking within the meaning of the statute, and that to constitute this offence, it did not require such a taking as was necessary in larceny. *R. v. Glover, R. & Ry.* 269.

2. That he took them in the night time. And the night time, it should seem, must be understood to mean such a time after sun-set and before sun-rise, when there is not day-light enough to enable you to distinguish a man's countenance,—as was formerly the rule in burglary, at common law. See 1 *Hawk. c. 38, s. 2.* If it appear to have been in the day time, the prisoner must be acquitted.

3. That the place in which he took the conies, was a warren or ground used for the purpose of keeping or breeding conies or hares respectively, situate in the parish, &c., and in the occupation of or belonging to C. D. Whereupon an indictment for this offence, it appeared that the prosecutor kept rabbits, which ran about loose in his rick yard, and that they had been destroyed by poison in the night time: Patteson, J., held that it was not a case within the statute; that the statute applied to places commonly called rabbit warrens, and not to places where a few rabbits might be kept. *R. v. Garratt et al., 6 Car. & P.* 369.

*Night Poaching.**Indictment.*

— } The jurors for our Lady the Queen, upon their
to wit. } oath present, that A. B., E. F., and G. H., together
with divers other persons to the said jurors aforesaid unknown,
on the — day of —, in the year of our Lord —, about
the hour of eleven in the night of the same day, being then re-
spectively armed with guns [“any gun, cross-bow, fire-arms,
bludgeon, or any other offensive weapon”] did then together,
by night as aforesaid, and armed as aforesaid, unlawfully

enter certain land [*“any land, whether open or inclosed”*] in the parish of —, in the county of —, then in the occupation of one C. D., and were then, by night as aforesaid, and armed as aforesaid, in the said land, for the purpose therein of taking and destroying game [*“taking or destroying any game or rabbits”*]: against the form of the statute in such case made and provided, and against the peace of our Lady the Queen, her crown and dignity. [*You may add a count for assaulting or offering violence to the gamekeepers, if necessary, as ante, p. 288. R. v. Pinacane et al., 5 Car. & P. 551. You cannot however add a count for shooting, &c., with intent to murder, or do some grievous bodily harm, for that is a felony, this a misdemeanor only. Where there was a separate indictment for shooting at the gamekeeper, and an application was made on the part of the defendant that the prosecutor should elect for which offence he should proceed, both arising out of the same transaction,—Parke, J., held that the prosecutor was not bound to abandon either; they were perfectly distinct offences, and the one could not possibly merge in the other. R. v. W. and J. Handley, 5 Car. & P. 565.*

It is usual to name the close, if it have a name, or in some other manner to identify it. Where in one count it was called a close, and in another certain inclosed ground, but without name, ownership, occupation, or abutments, it was holden insufficient. R. v. Ridley, R. & Ry. 515. And where it was described as a certain cover, Vaughan, B., held it to be too general and bad. R. v. Crick, 5 Car. & P. 508. But where it was described as “certain land in the parish of Stoke-upon-Trent, in the county aforesaid, in the possession and occupation” of J. S., Taunton, J., held it to be sufficient; R. v. Mellor, 2 Dowl, 173; and the same was laid down by Ld. Campbell, C. J., in R. v. Uezell et al., 20 Law J. 192 m. It is unnecessary to state that the land is inclosed or uninclosed. R. v. Andrews, 2 Mo. & R. 37.

Misdemeanor; transportation for not more than fourteen nor less than seven years;—or imprisonment and hard labour for not more than three years. 9 G. 4, c. 69, s. 9.

The offence can be tried only before justices of gaol delivery; 9 G. 4, c. 69, s. 6; and consequently not at sessions.

Evidence.

To maintain this indictment, the prosecutor must prove—

1. That the prisoners, or the prisoners and others, to the number altogether of three or more, entered the land men-

tioned in the indictment, or were in it, in the night time, which is defined—"to commence at the expiration of the first hour after sun-set, and to conclude at the beginning of the last hour before sun-rise." 9 G. 4, c. 69, s. 12. A variance between the hour stated in the indictment and that proved, will not be material, provided it appear to be within the hours here mentioned.

As to the entry, the words of the Act are "unlawfully enter or be in any land;" which words would seem to include the tenant of the land himself, if he have no right by his lease or otherwise to take or destroy the game there. Formerly it was deemed necessary to show that the prisoners, or the prisoners and others to the number of three, were all in the same close at the same time; and where an indictment charged that the prisoners with others were in Rodborough Hill Brake in the night time, for the purpose, &c., and the evidence was that one only was seen in the brake, the others being in an adjoining wood, separated from the brake by the high road: Patteson, J., held that the evidence did not sustain the indictment; they should all be proved to have been in the place mentioned in the indictment. *R. v. Dowdell et al.*, 6 Car. & P. 398. But it was afterwards holden that where two entered a preserve and two others remained outside, but they were all of the same party, and all there for the same joint purpose, all might be found guilty. *R. v. Locket*, 7 Car. & P. 300. *R. v. Passey*, Id. 282. *R. v. Worker*, Ry. & M. 165. So, where, upon an indictment against six men for this offence, it was proved that they were all in a lane at the side of the field named in the indictment, setting nets, one of them remained with the nets, whilst the others went into the field to beat for game, they then came out, took up the nets, and had proceeded some distance together on the road when they were apprehended: it was objected that as those who were in the field were not identified, all must be acquitted; but Wilde, C. J., told the jury, that if they were of opinion that all the defendants acted in concert, some going into the field beating for game, whilst others rendered their aid by remaining outside the hedge, they were all liable to be found guilty; the defendants being all found guilty, Wilde, C. J., reserved the question, whether his direction to the jury was correct, for the opinion of the fifteen judges, who, after argument and consideration, held the direction to be correct. *R. v. Whittaker et al.*, 2 Car. & K. 686. And lastly, in a very recent case, reserved for the opinion of the criminal appeal court, it was stated that the prisoner with two others, armed with guns, went together in the night time for the purpose of killing game; they were seen together in close A., one of the closes mentioned in the indictment, but not in search of game, there being no game in it, but one of them was seen in the adjoining

close B., where there were pheasants, for the purpose of taking or killing them; the indictment stated that they were "in inclosed land occupied by Charles White," and both the closes A. and B. were in the occupation of White: the judges held that the defendants were properly convicted: Lord Campbell, C. J., said that a practice had been introduced of naming a particular close in the indictment, which was wholly unnecessary; if it state that the men were in a certain piece of land, describing it, as for instance that it was in the occupation of any person named, it is enough; if the men were together forming one party for the purpose of destroying game in any part of the land, though the land comprise whiteacre, blackacre, greenacre and other fields, and though one of the men be in whiteacre, another in blackacre, and a third in greenacre, they commit one offence within the Act of Parliament: Parke, B., said that if three persons be in a piece of land for the purpose of destroying game there, they are within the Act, although portions of the land be described in the indictment as being in the occupation of different persons; the words "open or inclosed" were inserted to prevent parties from supposing that they might destroy game on waste land with impunity: and Alderson, B., added, that it was necessary to describe the land, but it might be alleged to be two closes, even though held by different occupiers, and although one close be open and the other inclosed. *R. v. Uezzell et al.*, 20 *Law J.* 192 *m.* Formerly if any name were given to the close, a variance between that and the name proved would be fatal; see *R. v. Owen et al.*, *Ry. & M.* 118; but now it should seem that the variance might be remedied by amendment. See 14 & 15 *Vict. c.* 100, s. 1, *ante*, p. 100. So, if there were any material variance between the indictment and proof in the name of the person stated to be the owner of the land, or in the parish, or other local description, it would have been fatal; but all this may now be remedied by amendment. 14 & 15 *Vict. c.* 100, s. 1, *ante*, p. 100.

2. That the defendants or some of them were armed with a gun or other weapon. The words in the Act are "any of such persons being armed with any gun, cross-bow, fire-arms, bludgeon, or any other offensive weapon." Where large stones were thrown at the gamekeepers by the poachers, it was left to the jury to say whether they had brought the stones with them, or had found them on the spot, for if the former, they were offensive weapons within the Act. *R. v. Grice*, 7 *Car. & P.* 803. Where one of the prisoners had a stick with him, large enough to be deemed a bludgeon, but which he ordinarily used as a crutch, being lame: Taunton, J., held that it was a question for the jury, whether he took it out upon the occasion in question, with intent to use it as an offensive

weapon, or merely for the purpose to which he ordinarily applied it; the prisoner was acquitted. *R. v. Palmer, Moody & M.* 70. But although the indictment charge that the prisoners were all armed, proof that any one of them was armed will support it. Where upon an indictment against three persons, charging them with being out at night, armed with guns, with intent to kill game, one of the prisoners was identified as having had a gun on that night, and it was proved that there was a second gun, but the witness could not swear which of the other two prisoners had it: all the prisoners were convicted; but the judge doubting whether the two latter prisoners could be deemed to come within the description in the indictment, as persons armed with guns, reserved the point for the opinion of the judges, who were unanimously of opinion that the conviction was right. *R. v. Smith, O'Flanagan, and Preston, R. & Ry.* 368. So, where eight were charged with being armed with guns, and the proof was that two were armed with guns, the rest with bludgeons,—they were all convicted, and the judges held the conviction to be right. *R. v. Goodfellow et al., 1 Car. & K.* 724. So, upon a former statute upon this subject (57 G. 3, c. 90), where it was necessarily stated that the prisoners were “found” armed with guns, &c., and the evidence was, that the flash of one of their guns was seen in a wood, but before the prisoners themselves were seen, they had abandoned their guns, and were afterwards found creeping away upon their knees: the prisoners being convicted, the judges held the conviction to be right, being of opinion that the prisoners were found armed within the meaning of the statute. *R. v. Nash et al., R. & Ry.* 386. But upon an indictment on that statute, where it was proved that of two prisoners indicted, one only was armed on the night in question, and the other was not then aware that his companion was armed, the judges held that the prisoner who was not armed could not be convicted. *R. v. Southern, R. & Ry.* 444. Such a case, no doubt, would be within the words of the present statute; but whether upon a fair construction it could be said to be within the meaning of it, may be doubted.

3. That they entered the land, thus armed, for the purpose of taking or destroying game or rabbits, as stated in the indictment. And the word “game” here, shall be deemed to include hares, pheasants, partridges, grouse, heath, or moor game, black game, and bustards. 9 G. 4, c. 69, s. 13. The purpose is proved, by proving facts from which the jury may presume it; if it be proved that they did take or destroy game or rabbits on the land on that occasion, it is the best evidence perhaps that they came there for that purpose. The intent however must be to take or destroy game or rabbits

the particular land, which they are stated in the indictment to have entered, &c. *See R. v. Barham, Ry. & M. 151. R. v. Gainer, 7 Car. & P. 231. R. v. Capewell and Pegg, 5 Car. & P. 549.*

The prosecution must appear to have been commenced within twelve calendar months after the commission of the offence. 9 G. 4, c. 69, s. 4. But the commitment of the defendant for trial, *R. v. Austin, 1 Car. & K. 621*, or even the information and issuing of the warrant to apprehend, or at least the apprehension of the defendant thereon, *R. v. Brooks et al., 2 Car. & K. 402*, may be deemed the commencement of the prosecution, for this purpose.

Taking Fish in Water belonging to a Dwelling-house.

Indictment.

— } The jurors for our Lady the Queen, upon their
to wit. } oath present, that A. B., on the — day of —,
in the year of our Lord —, unlawfully and wilfully did take
and destroy [*“take or destroy”*] ten fish called trout, in cer-
tain water running through certain land [*“run through or
be in any land”*] in the parish of —, in the county of —,
called —, adjoining [*“adjoining or belonging to”*] to the
dwelling of C. D. there situate, of which said water the said
C. D. was then and still is the owner [*or, in which said water
the said C. D. had then and still has a right of fishery*]:
against the form of the statute in such case made and provided,
and against the peace of our Lady the Queen, her crown and
dignity.

*Misdemeanor; 7 & 8 G. 4, c. 29, s. 34; fine or imprison-
ment, or both; the imprisonment to be with or without hard
labour, and the whole or any part of it solitary, as the court
shall think fit. Id. s. 4.*

Evidence.

To maintain this indictment, the prosecutor must prove—

1. A taking or destruction of the fish, or some of them, mentioned in the indictment. *See Glover's case, ante, p. 405.* This part of the statute, however, does not extend to any person angling in the daytime. 7 & 8 G. 4, c. 29, s. 34.

2. That the place where they were taken or destroyed, was either a stream running through the land, or a pond in the

Stealing Oysters.—Sta

land, if so stated (for the statute extends to the dwelling-house of the thief, and that the stream or pond either be had a right of fishery in it :—as

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Stealing Oysters or Oys

Indictment.

— } The jurors for our Lady
to wit. } oath present, that A. B., on — day of —,
in the year of our Lord —, feloniously did steal, take, and
carry away one hundred oysters from a certain oyster bed
[“*oyster bed, laying, or fishery*”], called —, the property
of C. D., and sufficiently marked out and known as the pro-
perty of the said C. D. : against the form of the statute in
such case made and provided, and against the peace of our
Lady the Queen, her crown and dignity.

*Felony ; same punishment as for simple larceny ; 7 & 8
G. 4, c. 29, s. 36 ; that is, imprisonment, with or without
hard labour, for not more than two years, (and the imprison-
ment solitary for the whole or any part of that time), and,
if a male, to be once, twice, or thrice publicly or privately
whipped, if the court shall think fit. See ante, p. 355.*

Evidence.

To maintain this indictment, the prosecutor must prove—

1. The taking of the oysters, or some of them, from the
oyster bed, laying, or fishery, described in the indictment, in
the same manner as in larceny. *See ante*, pp. 371, 369.

2. That the oyster bed, laying or fishery, was at the time
the property of C. D., and was sufficiently marked out or known
as such.

4. Stealing Things fixed to the Freehold.

Stealing Lead, Iron, &c., fixed to Buildings, &c.

Indictment.

— } The jurors for our Lady the Queen, upon their
to wit. } oath present, that A. B., on the — day of —,
in the year of our Lord —, feloniously did rip, cut, and

the [“if any person shall steal,—or rip, cut, or break, with intent to steal”] fifty pounds weight of lead [“any glass or woodwork belonging to any building whatsoever,—or any lead, iron, copper, brass, or other metal, or any utensil or fixture, whether made of metal or other material, respectively fixed in or to any building,—or any thing made of metal, fixed in any land being private property, or for a fence to any dwelling-house, garden, or area, or in any square, street, or other place dedicated to public use or ornament”] the property of C. D., and then fixed to a certain dwelling-house of the said C. D., situate in the parish of —, in the county of —, with intent the said lead then feloniously to steal, take, and carry away: against the form of the statute in such case made and provided, and against the peace of our Lady the Queen, her crown and dignity. (*Second count.*) And the jurors aforesaid, upon their oath aforesaid, do further present, that the said A. B., on the day and year aforesaid, feloniously did steal, take and carry away fifty pounds weight of lead, the property of C. D., and then fixed to a certain dwelling-house of the said C. D., situate in the parish of —, in the county of —: against the form of the statute in such case made and provided, and against the peace of our Lady the Queen, her crown and dignity. [*If the thing taken, &c., be fixed in a square, street, or other like place, it is not necessary to allege it to be the property of any person.* 7 & 8 G. 4, c. 29, s. 44.

Felony; punishable in the same manner as simple larceny; 7 & 8 G. 4, c. 29, s. 44; that is, by imprisonment, with or without hard labour, for not more than two years (the imprisonment solitary for the whole or any portion of the time), and if a male, to be once, twice, or thrice publicly or privately whipped, if the court shall think fit. Ante, p. 355.

Evidence.

To maintain the first count of this indictment, the prosecutor must prove—

1 The ripping, cutting, or breaking the lead from the building, as mentioned in the indictment.

2. That it was then fixed to the dwelling-house of, or in the occupation of, C. D., in the parish, &c., as stated in the indictment. A church has been holden to be a “building” within a former Act upon this subject. *R. v. Hickman*, 2 East, P. C. 593. 1 Leach, 318. 1 Hawk. c. 45, s. 11. And a cart-shed in a field, made of boards, with a door which locked, but the roof not yet thatched, has been holden to be a building within this Act. *R. v. Worrall*, 7 Car. & P. 516. An iron bar affixed to the copper hole of a hothouse in a

garden, has been holden to be a fixture to a building, within the meaning of the former Act upon this subject. *Marney's case*, 1 *Hawk. c. 45, s. 13*. But window sashes, temporarily fixed in the window frames, merely to prevent their falling out, but not beaded or permanently fastened there, were holden not to be fixed to the building within the meaning of that Act. *Hodge's case*, *Id. s. 7, 1 Leach*, 240. So a wooden gate, with an iron spring latch and clasp, and two pieces of iron called upper eyes, which might be lifted on and off of the hooks of the gate post at pleasure, was holden not to be a fixture. *Challis's case*, 1 *Hawk. c. 45, s. 8*. In all these cases, where it is doubtful whether the thing taken was fixed or not, it is prudent to add a count for a simple larceny.

3. The intent to steal it. *See ante*, pp. 366, 381. This is to be inferred from the acts of the defendant. *See ante*, pp. 119, 120.

To maintain the second count, the prosecutor must prove—

1. The stealing of the lead, as in larceny. But if the lead were fixed when he stole it, the offender can only be indicted in that county, and not in any other county into which he may have carried the lead. *R. v. Millar*, 7 *Car. & P.* 665.

2. That it was then fixed to the dwelling-house of, or in the occupation of, C. D., in the parish, &c., as under the last count. If it be doubtful whether the lead was fixed at the time, add a count for a simple larceny, for if the lead were not fixed, within the meaning of the Act, the defendant would not be found guilty on the above indictment. *R. v. Geoek*, 8 *Car. & P.* 293.

Stealing Trees, Shrubs, or Underwood.

Indictment.

— } The jurors for our Lady the Queen, upon their
to wit. } oath present, that A. B., on the — day of —,
in the year of our Lord —, in a certain pleasure ground
[“*park, pleasure ground, garden, orchard, or avenue, or in
any ground adjoining or belonging to any dwelling-house*”]
of C. D., in the parish of —, in the county of —, feloniously did cut and root up [“*if any person shall steal,—or shall cut, break, root up, or otherwise destroy or damage with intent to steal*”] one oak tree [“*the whole or any part of any tree, sapling, or shrub, or any underwood*”] the property of the said C. D., in the said pleasure ground then growing, with intent then the said tree feloniously to steal, take, and carry away, thereby then doing injury to the said

C. D. to an amount exceeding the sum of one pound : against the form of the statute in such case made and provided, and against the peace of our Lady the Queen, her crown and dignity. (*Second count.*) And the jurors aforesaid upon their oath aforesaid do further present, that the said A. B., on the day and year aforesaid, in a certain pleasure ground of the said C. D., in the parish of —, in the county of —, feloniously did steal, take, and carry away, a certain other oak tree, of the value of [one] pound, the property of the said C. D., in the said pleasure ground then growing : against the form of the statute in such case made and provided, and against the peace of our Lady the Queen, her crown and dignity.

Felony ; punishable in the same manner as simple larceny ; 7 & 8 G. 4, c. 29, s. 38 ; that is, by imprisonment, with or without hard labour, for not more than two years, (the imprisonment solitary for the whole or any part of the time), and if a male, to be once, twice, or thrice publicly or privately whipped, if the court shall think fit. Ante, p. 355.

The same punishment, if the tree, &c., be growing elsewhere, and the value, or the amount of injury done, exceed the sum of five pounds. 7 & 8 G. 4, c. 29, s. 38.

Evidence.

To maintain the first count of this indictment, the prosecutor must prove—

1. That the prisoner cut or rooted up the tree mentioned in the indictment ; *see R. v. Hodges, infra* ; and that the injury thereby occasioned, exceeded in amount the sum of one pound.

2. That the tree was at the time growing in a pleasure ground of C. D., or in his occupation, as described in the indictment. *See R. v. Hodges, infra.* Also the parish, &c.

3. The intent to steal it. This is proved from the words or acts of the defendant, or by proof of any other facts from which the jury may fairly infer it. *See ante*, pp. 119, 120.

To maintain the second count, the prosecutor must prove—

1. A stealing of the tree, as in larceny. *See ante*, pp. 369, 371. It must be laid and proved to have been of the value of one pound at least ; if it were of a less value the offence would be punishable on summary conviction only, unless it be a third offence, that is to say, an offence committed after two previous convictions. 7 & 8 G. 4, c. 29, s. 39. Where, upon an indictment for stealing pear trees, it appeared that they were grafted seedlings about seven feet high, and it was objected that

they must be deemed plants within the meaning of another section of the Act, and not trees, &c., within the 38th section on which this indictment is framed: but Parke, J., held that they were properly described as trees. *R. v. Hodges, Moody & M.* 341. Stealing plants, roots, fruits, or vegetable productions, growing in a garden, orchard, nursery ground, hot-house, green-house, or conservatory, is punishable only on summary conviction for a first offence, but is a felony, and punishable as simple larceny, if committed after a previous conviction. 7 & 8 G. 4, c. 29, s. 42.

2. That the tree was, at the time, growing in a pleasure ground of C. D., in the parish, &c. The words in the act are, "park, pleasure ground, garden, orchard, or avenue, or in any ground adjoining or belonging to any dwelling-house." Where the tree was described as growing in ground adjoining a dwelling-house, and it appeared that the ground was separated from the house by a narrow paved entry and a paling: Parke, J., held that the evidence did not maintain the indictment; ground to be adjoining to a dwelling-house, within the meaning of the statute, must be immediately contiguous to it, without anything intervening. *R. v. Hodges, supra.* If the stealing, or the cutting, &c., with intent to steal, be of a tree growing elsewhere, the value, or the injury done must be laid and proved to exceed five pounds. 7 & 8 G. 4, c. 29, s. 38.

Stealing from Mines.

Indictment.

— } The jurors for our Lady the Queen, upon their
to wit. } oath present, that A. B., on the — day of —,
in the year of our Lord —, in a certain coal mine of C. D.,
in the parish of —, in the county of —, ["mine, bed, or
vein thereof"] feloniously did sever ["steal, or sever with in-
tent to steal"] one ton weight of coal ["the ore of any metal,
or any lapis calaminaris, manganese or mundick, or any woad,
black caroke, or black lead, or any coal or cannel coal"] the
property of the said C. D., in the said mine then being, with
intent the said coal feloniously to steal, take, and carry away:
against the form of the statute in such case made and pro-
vided, and against the peace of our Lady the Queen, her
crown and dignity. (*Second count.*) And the jurors aforesaid
upon their oath aforesaid do further present, that the said
A. B., on the day and year aforesaid, in a certain coal mine
of the said C. D., in the parish of —, in the county of —,
feloniously did steal, take, and carry away from the said mine
one ton of coal, the property of the said C. D.: against the

form of the statute in such case made and provided, and against the peace of our Lady the Queen, her crown and dignity.

Felony; punishable in the same manner as simple larceny; 7 & 8 G. 4, c. 29, s. 37; that is, by imprisonment, with or without hard labour, for not more than two years, (the imprisonment solitary for the whole or any part of the time), and if a male, to be once, twice, or thrice publicly or privately whipped, if the court shall think fit. Ante, p. 355.

Evidence.

To maintain the first count of this indictment, the prosecutor must prove—

1. A severance of the coal in the mine.
2. That the mine was then the property of C. D., or in his occupation as tenant, and that it is situate in the parish, &c. *See R. v. Bleasdale, infra.*

3. The intent to steal. This is proved from the words or acts of the defendant, or by proof of other facts from which the jury may fairly presume it. The very act of severing the coal if the defendant had no *bona fide* claim of right to it, is sufficient presumptive evidence of an intent to steal. *See ante*, pp. 119, 120.

To maintain the second count, the prosecutor must prove—

1. The stealing of the coal, either by the prisoner himself, or by others by his orders. Where the lessee of a coal pit was charged, in one count, with stealing coal, the property of thirty different persons, who had mines in the vicinity of his, into which he caused his men to work and take the coal,—the prisoner's counsel, at the trial, applied that the counsel for the prosecution should select some particular act done on a particular day, and confine his statement and evidence to that; but the judge (Erle, J.) refused to interfere; the case was then gone into and proved, and the prisoner's counsel objected to the count, as charging a stealing of the coal of several persons, in different places and at different times: but the judge held that the different workings might be relied on to show the felonious intent, although they extended into twenty different counties, and the coal belonged to twenty different persons, and extended over twenty years, if the mining operations were continuous for that time. *R. v. Bleasdale, 2 Car. & K. 765.* Here the men were innocent

agents, and the defendant was properly indicted as principal. But even if the men had a guilty knowledge of the wrong they were doing, and the defendant were in that case only accessory before the fact, yet he might be indicted as principal; for now an accessory before the fact to a felony, may be indicted, tried, convicted, and punished, in all respects as if he were a principal felon. 11 & 12 Vict. c. 46, s. 1. *See ante*, p. 16. Where the working miners, however, cheated each other, by one taking from the heap of another for the purpose of increasing the sum he was to receive for his labour, but the whole was rendered to the owner: the judges held it not to be larceny; *R. v. Webb, Ry. & M.* 431; but now by stat. 2 & 3 Vict. c. 58, s. 10, if any person employed in a mine in the county of Cornwall, shall take, remove, or conceal any ore, with intent to defraud the proprietor or any workman, he shall be guilty of felony, and punished as for simple larceny.

2. That the mine was then the property of C. D., or in his occupation as tenant; *see R. v. Bleasdale, supra*; and that it is in the parish, &c.

5. *Stealing from the Person.*

Robbery.

Indictment.

— } The jurors for our Lady the Queen, upon their
to wit. } oath present, that A. B., on the — day of —,
in the year of our Lord —, in and upon C. D. feloniously
did make an assault, and him the said C. D. did then feloniously put in fear and danger of his life, and did then feloniously and violently steal, take, and carry away, from the person, and against the will of the said C. D., certain money of the said C. D., and one gold watch of the goods and chattels of the said C. D.: against the form of the statute in such case made and provided, and against the peace of our Lady the Queen, her crown and dignity. [*If the prosecutor were robbed of bank notes, they may be described as money, as in the above form.* 14 & 15 Vict. c. 100, s. 18, *ante*, p. 90. *Where an indictment for robbery charged four persons with assaulting A. B. and C. D. and stealing two shillings from A. B. and one shilling from C. D.,—Tindal, C. J., held it to be good, the whole being one transaction.* *R. v. Giddins et al., Car. & M.* 634.

Felony; transportation for not more than fifteen years, nor less than ten; or imprisonment (with or without hard

labour, sect. 10) for not more than three years. 1 Vict. c. 87, s. 5. Accessories before the fact, the same punishment; ante, p. 16; accessories after the fact, imprisonment, with or without hard labour, for not more than two years. 1 Vict. c. 87, s. 9. Costs, see ante, p. 186; costs of apprehension, see ante, p. 189. As to robbery with violence, see post, p. 424.

Evidence.

To maintain this indictment, the prosecutor must prove—

1. The force or violence or threats used by the prisoner, in taking from him, or compelling him to deliver up, the property in question. Robbery is defined to be a felonious taking of money or goods from the person of another, or in his presence, against his will, by violence or putting him in fear. And this violence or putting him in fear must precede or accompany the stealing. And therefore where it appeared that the prisoner caught hold of the prosecutor's watch chain and jerked his watch from his pocket with considerable force, upon which a scuffle ensued and the prisoner was secured; Garrow, B., held that the force used to obtain the watch did not make the offence amount to robbery; nor did the force used afterwards in the scuffle, for the force, &c., necessary to constitute robbery, must be either immediately before or at the time of the larceny, and not after it. *R. v. Gnosil*, 1 Car. & P. 304. So, where a man having money in his hand, some thieves struck it out, and then by menaces drove the owner off, and they took the money up themselves, and made off with it: this was holden not to be robbery; for the menace, which alone put the prosecutor in fear, was after the loss of his money. *R. v. Francis et al.*, 2 Str. 1015. *R. v. Grey et al.*, 2 East, P. C. 708. So, where the prisoner being on horseback, desired the prosecutor to open a gate for him, and whilst he was doing so the prisoner picked his pocket of his purse; the prosecutor turning round, and seeing his purse in the prisoner's hand, demanded it of him, upon which the prisoner threatened him that if he spoke of his purse he would pull his horse about his ears, and drive him out of the country: this was holden not to be robbery, because the words of menace were not used until after the taking. *Harman's case*, Ro. Rep. 154. 1 Hals, 534. 2 East, P. C. 736. 726.

As to what violence is sufficient to constitute robbery,—the ordinary mode formerly of presenting a pistol at a man, is deemed sufficient. In Norden's case, (*Fost.* 129, *ante*, p. 364), it is said that the highwayman presented a weapon and demanded his money. So, if the robber assault the party in

any other way, under such circumstances of terror as to cause him to deliver up his money or other property, 1 *Hawk. c.34, s. 8*, or if there be a struggle for the property before it is taken, *Davies's case, 2 East, P. C. 709*, it is sufficient. Where a man attempted to commit a rape, and the woman gave him money to desist, which he took, but still continued his violence to her until interrupted,—this was holden to be robbery. *R. v. Blackham, 2 East, P. C. 117*. Where a man employed to keep a woman in custody until her husband returned with bail for her, put handcuffs on her, put her into a hackney coach to take her to prison, and whilst in the coach he put his hand into her pocket and took out four shillings: this was holden to be robbery. *Gascoigne's case, 2 East, P. C. 709, 1 Leach, 313*. Where the prisoner laid violent hold of the seals and chain of the prosecutor's watch, and succeeded in pulling the watch out of his fob; the watch, however, being secured by a steel chain, which went round the prosecutor's neck, prevented the prisoner from immediately taking it; but by pulling, and by two or three jerks, he broke the steel chain, and then ran off with the watch: Park, J., before whom the prisoner was tried, held this to be sufficient violence to constitute the crime of robbery; that although there was no actual injury to the person, yet as force was necessary to separate the thing stolen from the person, it was robbery: the prisoner being convicted, and the case being afterwards reserved for the opinion of the judges, whether there was sufficient violence in this case to constitute robbery, or whether it did not amount merely to a stealing from the person, they were unanimously of opinion that the conviction was right; for the prisoner could not obtain the watch at once, but had to overcome the resistance of the steel chain by actual force. *R. v. Mason, R. & Ry. 419. See R. v. Guesil, supra*. So, where a man snatched at an ear-ring in a lady's ear, tore it from the ear, which bled much, and was attended with great pain,—this was holden to be robbery. *R. v. Lapior, 2 East, P. C. 557, 1 Leach, 360*.

But actual force is not essentially necessary to constitute robbery; if by the use of threats, by word or gesture, sufficient to overcome a mind of ordinary firmness, a man be induced to part with his property to another who has no pretence or claim of right to it, it is as much a robbery as if it had been obtained by actual violence. *Fest. 128*. Where a man was intimidated by a mob asking him for money, which he gave them, it was holden to be robbery. *Taplin's case, 2 East, P. C. 712*. And where, upon the trial of an indictment for robbery, it appeared that a mob came to the prosecutor's house, and the prisoners, who were amongst them, advised him to give them something to get rid of them and prevent mischief, and they obtained money from him by these means:

Parke, J., (after consulting with Vaughan, B., and Alderson, J.,) admitted evidence of the acts of the mob at other places, both before and after on the same day, to show that the advice of the prisoners was not *bonâ fide*, but in reality a mere mode of robbing the prosecutor. *R. v. Winkworth et al.*, 4 Car. & P. 392. So, if a man give money, on a threat to destroy his child if he refused, this would be robbery. *Per Hotham, B.*, in *Donolly's case*, 2 East, P. C. 718. Where, at a time of great riots in Birmingham, where the mob had plundered and pulled down several houses, the prisoners went to the prosecutor's house near Birmingham, accompanied by a stranger, whom they represented as the head of the mob; the stranger told him that his house was marked to come down the next morning at two o'clock, and that it should be so unless he gave him something for his men to drink; he asked twenty guineas, but all the prosecutor had was nine guineas and a half, and, terrified for the safety of his property, but not apprehensive of any injury to his person, he gave them to the stranger, and the prisoners afterwards had a share of them; the prisoners being indicted for this as robbery, the jury found that the prosecutor did not deliver his money from any apprehension of personal danger, but from fear that if he refused, his house would thereafter be pulled down as other houses in Birmingham had been; and the case being reserved for the opinion of the judges, they held it to be robbery. *R. v. J. and E. Astley*, 2 East, P. C. 729, *S. P. R. v. Simons*, and *R. v. Brown*, *Id.* 731. So, it was formerly holden that obtaining money from a man, by threatening to charge him with unnatural practices, was robbery, whether the threats were accompanied with any constraint of his person, *R. v. Canon and Coddington*, *R. & Ry.* 146, or not; *R. v. Egerton*, *R. & Ry.* 375; and this, although he gave up the property, not from any apprehension of danger to his person, nor of prosecution or punishment, but from a fear of losing his character or situation, by having so abominable an offence imputed to him, *Id.*, or even from a desire and intention to detect and prosecute the offender. *R. v. Fuller*, *R. & Ry.* 408. It was afterwards declared to be robbery by *stat. 7 & 8 G. 4, c. 29, s. 7*. But it is now made a substantive offence, by *stat. 1 Vict. c. 87, s. 4*, and I have already treated of it, *ante*, p. 327. So, accusing, or threatening to accuse a man of such an offence, with intent to extort, although no money be obtained by it, are, we have seen, (*ante*, pp. 323, 325), felonies, and punishable with great and deserved severity. So, sending a letter threatening to kill or murder any person, or to burn or destroy his house, out-houses, barns, stacks of corn, &c., is a felony, and punishable with severity; of which latter offence the reader will find the form of indictment and the evidence, in the next section. But where a woman was forced into a mock auction room in the Strand, and kept there, and required to

pay for goods said to be knocked down to her, and threatened to be taken before a magistrate, and from thence to Newgate, for not paying for them, by which latter threat the parties obtained money from her: this was holden not to be robbery, for as the woman had done no wrong, she ought not to be afraid of going before the magistrate. *R. v. Wood and Knewland*, 2 East, P. C. 732.

2. A larceny of the property from the person, namely, a taking, a carrying away, and a felonious intent, as directed, *ante*, p. 371. The taking may be actual or constructive, as in larceny. *See ante*, p. 371. An actual taking, is where the robber, by violence or threats, actually takes the money or other property from the prosecutor. And not only the taking of money out of a man's pocket, or the horse on which he is riding, but the taking of any thing openly and before his face, which is under his immediate and personal care and protection, may properly enough be said to be a taking from the person. 1 *Hawk. c. 34, s. 6*. And therefore a man who assaults me and takes away my horse standing by me, or having put me in fear drives my cattle away in my presence out of my pasture, or takes up my purse which in my fright I cast into a bush, or my hat which fell from my head, or robs my servant of my money before my face,—may be indicted as having robbed me of them. *Id.* But if a robber cut my girdle to get my purse, and the purse fall to the ground, and he never gets it into his possession, this is not a robbery. 1 *Hawk. c. 34, s. 3*. If thieves come to rob A., and finding little about him, force him by menace of death to bring them a greater sum, which he does, and they take it: this is robbery, the fear from the menace operating until the delivery of the money. *Staundf. 27*. 1 *Hale*, 532. A constructive taking, is, where a robber obtains my money or other property from me under some feigned pretence, and I from fear yield to the pretence, although I know it to be feigned. As if a man with a drawn sword, under circumstances calculated to create terror and evincing a felonious intent, ask alms of me, and I fearing the consequences of a refusal, give him money, this is robbery; and the like as to all colourable gifts extorted by fear of violence. 1 *Hale*, 533. Or if violence be used at first ineffectually, and the robber then desist, and ask the money as alms, and from fear of further violence I give it to him, it is robbery. 1 *Hawk. c. 34, s. 8*. Where during the riots in London, in 1780, a boy, with a cockade in his hat, knocked violently at the door of the house of one Mahon, and when Mahon opened it, the boy said, "God bless your honour, remember the poor mob," but Mahon told him to go along, and the boy said, "Then I will go and fetch my captain;" the boy came back presently with a mob of about one hundred per-

sons, armed with sticks, &c., headed by one Taplin on horseback, and the boy said, "Now I have brought my captain," and some of the bystanders said "You must give them something;" Mahon then asked Taplin "How much," and Taplin answered, "Half-a-crown;" upon which Mahon gave him the half crown, although before that he had intended giving only a shilling; and then the mob gave three cheers and passed on: this was holden to be robbery. *Taplin's case*, 2 East, P. C. 712. Where a man took a bushel and a half of wheat, worth eight shillings, and forced the owner to take thirteen pence for it, threatening to kill her if she refused: the judges held this clearly to be robbery. *R. v. Simons*, 2 East, P. C. 712. So, where upon an indictment for robbery, it appeared that the prisoner with a great mob came to the prosecutor, who had then corn belonging to other persons in his possession, and offered him thirty shillings a load for it, and they said that if he would not take that, they would take the corn away; and the prosecutor was therefore obliged to sell it for thirty shillings a load, although it was worth thirty-eight shillings: this was held to be robbery, and the prisoner was convicted. *Spencer's case*, 2 East, P. C. 712. In an action against the hundred by one Merriman, for the value of some cheeses, &c., of which he had been robbed, it appeared that he was going along the highway with the cheeses in a cart, when he was stopped by one Hall, who insisted on seizing them for want of a permit (which was found by the jury to be a mere pretence for the purpose of defrauding Merriman, no permit being necessary), and after some altercation they agreed to go before the magistrate to determine the matter; in the mean time, other persons riotously assembled on account of the dearth of provisions, and in confederacy with Hall, carried away the goods in Merriman's absence: this was holden by Hewitt, J., to be robbery. *Merriman v. Hundred of Chippenham*, 2 East, P. C. 709.

The carrying away must be proved, as in simple larceny. See *ante*, p. 379. Where upon an indictment for robbery, it appeared that the prisoner snatched at an ear-ring in a lady's ear, tore it from the ear, but it fell amongst her hair, where she found it on her return home,—this was holden a sufficient asportation, and (from the force and violence with which was effected) robbery. *R. v. Lapier*, 2 East, P. C. 557. 1 Leach, 360. But where the prisoner, with a felonious intent, stopped a man carrying a feather bed, and told him to lay it down or he would shoot him; the man accordingly laid the bed upon the ground, but before the prisoner could take it up so as to remove it from the spot where it lay, he was apprehended: the judges held the offence to be incomplete. *R. v. Farrel*, 1 Leach, 266 n.

It must appear also that the property was taken against the

will or without the consent of the party robbed; *see ante*, p. 364; without any *bonâ fide* claim of right on the part of the taker; *ante*, p. 365; and with a felonious intent; *ante*, pp. 366, 381. Where the prisoner, a poacher, set wires in a manor to catch game, and the gamekeeper finding them, took them, and a pheasant which had been caught in one of them, into his possession; the prisoner demanded the wires and the pheasant from the gamekeeper, who refused to give them up; but the prisoner lifting up a large stick, and threatening to beat the gamekeeper's brains out if he did not, the latter fearing violence, gave them up: the prisoner being indicted for this as a robbery, Vaughan, B., held that if he acted upon the impression that the wires and pheasant were his property, there being in that case no *animus furandi*, the prisoner could not be convicted; and the jury being of that opinion, found him not guilty. *R. v. Hall*, 3 Car. & P. 409.

As to the goods stolen, the statute (7 & 8 G. 4, c. 29, s. 6), describes them as "any chattel, money, or valuable security." As to the meaning of valuable security, *see ante*, p. 392. Upon an indictment for robbery, it appeared that the prisoners attacked the prosecutor, but the only thing he had about him was a piece of paper containing a memorandum of money which a person owed him: Gurney, B., held it sufficient to constitute robbery. *R. v. Bingley et al.*, 5 Car. & P. 602. But where the prisoner, a female, was indicted for robbing a gentleman of a promissory note for 2,000*l.*, it appeared that she had procured a stamp for a note of that amount, inveigled the prosecutor to her house, detained him there by force for three hours, and under a menace of death compelled him to write the promissory note upon the paper, which she kept and endeavoured to procure it to be discounted the next day: nine of the judges held this not to be robbery, as the note was of no value to the prosecutor, and he never had the peaceable possession of it, so as to be able to do what he pleased with it. *R. v. Phipoe*, 2 East, P. C. 599. 2 Leach, 774. In this latter case, it is to be observed, that the paper and stamp were the property of the prisoner. *See R. v. Minter Hart*, *ante*, pp. 393, 394.

After the offence is once complete, it cannot be purged by the offender giving back the property stolen to the owner. *R. v. Peat*, 2 East, P. C. 557.

Principals.] If several, acting in concert, be present at a robbery, all are guilty, as well those who use violence, or take the property, as those who do not. 1 Hawk. c. 84, s. 5. But where a gang of poachers, consisting of the prisoners and one Williams, attacked a gamekeeper, beat him and left him senseless on the ground, and then went away; but Williams returned, and whilst the gamekeeper was still in-

sensible, took from him his gun, pocket book and money: *Park, J.*, held that this was robbery in Williams only. *R. v. Hawkins et al.*, 3 Car. & A. 392.

Verdict.] The jury may find the defendant guilty; or if the prosecutor fail in proving the violence or threats, &c., the jury may find the defendant not guilty of the robbery, but guilty of stealing from the person, *R. v. Walls et al.*, 2 Car. & K. 214, or of simple larceny; or if the larceny be not proved, the jury may find the defendant not guilty of the robbery, but guilty of an assault with intent to rob. 14 & 15 Vict. c. 100, s. 11, *ante*, pp. 174, 124.

Robbery, and Wounding, &c.

Indictment.

— } The jurors for our Lady the Queen, upon their
to wit. } oath present, that A. B., on the — day of —,
in the year of our Lord —. [*Here state the robbery, as
in the last form, ante, p. 417, except the conclusion; and
then add:*] and that the said A. B., immediately before [*or at
the time—or immediately after*] he so committed the said
robbery as aforesaid, feloniously did stab, cut, and wound the
said C. D. [*or one E. F., who then was there present*]:

Or—And that the said A. B., immediately before [*or at
the time—or immediately after*] he so committed the said
robbery as aforesaid, feloniously did beat, strike, [*and if any
other personal violence were offered, state it*] the said C. D.
[*or one E. F., who then was there present*]:

Or—And that the said A. B., at the time he so committed
the said robbery as aforesaid, was armed with a certain offensive
weapon [*“weapon or instrument”*] to wit, a [pistol]:
against the form of the statute in such case made and pro-
vided, and against the peace of our Lady the Queen, her
crown and dignity. [*There is also a clause in the statute,
sect. 8, which makes a robbery additionally penal, if com-
mitted by two or more persons; in such a case the indict-
ment may state that the defendant—“together with one
G. H.,” or “together with one other person to the jurors
aforesaid unknown,” &c.*

*Robbery, and cutting, stabbing, or wounding, is felony,
death.* 1 Vict. c. 87, s. 2.

*Robbery, and beating, striking, or using any other per-
sonal violence,—or robbery by two or more,—is felony, trans-
portation for life, or not less than fifteen years;—or im-
prisonment [with or without hard labour, s. 10] for not
more than three years, 1 Vict. c. 87, s. 3, the imprisonment*

solitary for not more than one month at a time, or three months in a year. Id. s. 10.

Evidence.

To maintain this indictment, the prosecutor must prove—

1. The robbery, as directed, *ante*, p. 418.

2. The stabbing, cutting, or wounding, (*see ante*, p. 260),—or the beating, striking, or other personal violence,—or the defendant being armed,—as stated in the indictment. The statute does not confine this to the party robbed, the words being—“whosoever shall rob *any* person, and — shall stab, cut, or wound *any* person;” and the same as to the striking or beating. So that if A. and B. be in company at the time of the robbery, and A. be robbed and B. wounded or beaten, it should seem to be within the meaning of the Act.

Assault with intent to Rob.

Indictment.

— } The jurors for our Lady the Queen, upon their
to wit. } oath present, that A. B., on the — day of —,
in the year of our Lord —, in and upon one C. D. feloniously
did make an assault, with intent then to rob the said C. D.,
and feloniously and violently to steal, take, and carry away
the monies, goods, and chattels of the said C. D., from the
person and against the will of the said C. D.: [*add, if the
facts will warrant it*—And the said A. B., at the time he so
committed the said assault, was armed with a certain offensive
weapon [*“weapon or instrument”*], to wit, a [pistol]:—or—
And the said A. B., at the time [*or immediately before, or
immediately after*] he so committed the said assault, did felo-
niously beat and strike [*if any other personal violence were
offered, state it*] the said C. D. [*or one E. F., who then was
there present*]: against the form of the statute in such case
made and provided, and against the peace of our Lady the
Queen, her crown and dignity. [*There is also a clause in
the statute, sect. 3, which makes an assault with intent to
rob, by two or more persons, additionally penal; in such a
case the indictment may state that the defendant on —,
“together with one G. H.” or “together with one other person
to the jurors aforesaid unknown,” &c.*

*Felony; imprisonment [with or without hard labour,
s. 10] for not more than three years, 1 Vict. c. 87, s. 6, the
imprisonment solitary for not more than one month at a
time, or three months in a year. Id. s. 10.*

If the defendant be armed,—or be in company with one or more other persons,—or beat or strike, &c.,—felony, transportation for life, or for not less than fifteen years,—or imprisonment [with or without hard labour, s. 10], for not more than three years. 1 Vict. c. 87, s. 3.

The imprisonment may be solitary for one month at a time, or three months in a year. Id. s. 10.

Evidence.

✓ An assault is an attempt to commit a forcible crime against the person of another. Therefore an assault with intent to commit a robbery, is nothing more than an attempt or endeavour to commit a robbery. And consequently, in order to maintain this indictment, for the assault with intent, &c., it is not necessary to prove an assault, in the vulgar and ordinary acceptation of the term, namely, an attempt to commit a battery; but all that is necessary, on the part of the prosecutor to prove, is, that the prisoner intended to rob him, and that he did some act, in the presence of the prosecutor, for the purpose of effecting the robbery intended. The intention must of course be proved from some overt act or expressions of the defendant; and the overt act will also prove the assault as well as the intention. Where upon an indictment against two persons for this offence, it appeared that the prosecutor was walking in Hyde Park, when one of the prisoners accosted him, asked him the way to the city, which the prosecutor told him; upon which the other prisoner came up, collared the prosecutor, and said, "You damned beast, you have been indecently exposing your person; I have been watching you and your friend (pointing to the other) for three quarters of an hour;" he then forced the prosecutor to go to the police station, the other prisoner accompanying them part of the way, and he there made the same charge against him, adding that the private parts of the men were exposed, and other circumstances; all this was a mere fiction, and many circumstances were proved to show that the whole was a preconcerted plan between the two prisoners to extort money from the prosecutor; but no money was given: Rolfe, B., told the jury that if this assault and charge were in pursuance of such a preconcerted plan, it was in law an assault with intent to rob, and the jury found the prisoners guilty accordingly; and the question being reserved for the opinion of the judges, whether these facts maintained the indictment, the charge made not coming within the meaning of the statutes as to accusing persons for the purpose of extorting money, &c., (*ante*, pp. 327, 328)—the judges held the conviction to be right, as there was actual violence, and an attempt to extort

money by means of that violence combined with threats calculated to induce the prosecutor to part with his money. *R. v. Stringer et al.*, 1 Car. & K. 188. But where a man, under a feasible claim of right, assaulted another for the purpose of getting certain money from him: it was holden that he could not be convicted. *R. v. Boden*, 1 Car. & K. 395.

2. Prove that he beat or struck, or used other violence to, the prosecutor, or other person,—as stated in the indictment. If you should fail in this, still the defendant may be convicted of the assault with intent to rob.

Demanding Money with Menaces or by Force, with intent to Steal.

Indictment.

— } The jurors for our Lady the Queen, upon their
to wit. } oath present, that A. B., on the — day of —,
in the year of our Lord —, did with menaces [*or by force*]
feloniously demand of C. D. certain money of the said C. D.
[*or a certain — of the goods and chattels of the said*
C. D.,—or a certain valuable security, to wit, a —, the pro-
perty of him the said C. D.,—“any property,”] with intent
the same then to steal, take, and carry away: against the form
of the statute in such case made and provided, and against the
peace of our Lady the Queen, her crown and dignity. [*You*
may add a count, stating the particulars of the menaces,
&c., used. Where the indictment stated that the prisoner
“feloniously by menaces did demand the monies of the
said J. A.” the judges held it insufficient, because it did not
state on whom the demand was made. *R. v. Dunkely et al.*,
Ry. & M. 90.

Felony; imprisonment [with or without hard labour, s. 10,] for not more than three years; 1 Vict. c. 87, s. 7; the imprisonment may be solitary, for not more than a month at a time, or three months in the course of a year. Id. s. 10.

Evidence.

To maintain this indictment, the prosecutor must prove—

1. The menaces or force used by the prisoner to the prosecutor, as stated in the indictment.

2. The demand of the property, as stated. And this demand may be either express, or implied from the menaces or

force, or other acts of the prisoner at the time: that it may be implied from the nature of the force used, appears from the words of the statute—"shall with menaces or by force demand," &c. Where the prisoner inveigled the prosecutor into a house, chained him, put a rope round his neck, fastened his feet to the floor by ropes, and then placed two sheets of paper, with pen and ink, before him, and required him on one sheet to write a cheque upon his banker for a sum of money, and on the other a letter requesting some deeds to be delivered to the bearer: this was holden by Patteson, J., not to be an offence within the former statute upon this subject, 7 & 8 G. 4, c. 29, s. 6 (which was in the same words as this, varying only in the punishment), for the prosecutor never had the peaceable possession of the cheque or request note, so as to be able to do what he pleased with them, which is as necessary in this case as in robbery. *R. v. Edwards*, 8 Car. & P. 521. See *R. v. Phipps*, ante, p. 423. The demand must appear to have been made upon the prosecutor. See *R. v. Dunkely et al.*, supra.

3. The intent to steal the property demanded. See ante, p. 381. This must be presumed from the words or acts of the prisoner, or from the other circumstances of the case. If the prisoner had no fair pretence or *bona fide* claim to the thing demanded; or if the circumstances of the case be such that if the prisoner had succeeded in obtaining from the prosecutor the thing demanded, he would have been guilty of a robbery or larceny: the jury may fairly presume the intent to be as laid in the indictment. But if, from the facts proved, it appear that the prisoner would not have been guilty of a robbery or larceny, had he succeeded in obtaining the thing demanded,—in that case the jury should acquit him. See *Edward's case*, supra.

Letter demanding Money with Menaces.

Indictment.

— } The jurors for our Lady the Queen, upon their
to wit. } oath present, that A. B., on the — day of —,
in the year of our Lord —, knowingly and feloniously did
send ["*send or deliver*"] to C. D. a certain letter ["*letter
or writing*"] directed to the said C. D., by the name and de-
scription of Mr. C. D., demanding money [*or a certain chat-
tel, to wit, —, or a certain valuable security, to wit, —*"]
of and from the said C. D., with menaces, and without any
reasonable or probable cause; and which said letter is as
follows, that is to say: [*here set out the letter verbatim.*]:
against the form of the statute, in such case made and provided,
and against the peace of our Lady the Queen, her crown and

dignity. [*The venue may be laid either in the county where the letter was received, or in that from which it was sent. Ante, p. 74. The letter must be set out. Lloyd's case, 2 East, P. C. 1122.*]

Felony ; transportation for life, or for not less than seven years ;—or imprisonment, [with or without hard labour, s. 4] for not more than four years, and, if a male, to be once, twice, or thrice publicly or privately whipped if the court shall think fit. 7 & 8 G. 4, c. 29, s. 8.

Evidence.

To maintain this indictment, the prosecutor must prove—

1. The sending of the letter containing the demand and menaces, as stated in the indictment. For this purpose he must produce the letter, and prove that he received it. It must then be proved that the prisoner sent or delivered it; for proof merely that it is in his handwriting, even by his own confession, will not be sufficient, *R. v. Howe, 7 Car. & P. 268*, without proof of circumstances from which the jury may fairly presume the sending by him also. Proof that he dropped a letter, directed to the prosecutor, into the prosecutor's premises, where it was likely to be found either by the prosecutor himself, or by some person who would deliver it to him, was holden by the judges to be a sending of the letter. *R. v. Wagstaff, R. & Ry. 398*. So, proof that he left the letter at a gate on the road near the prosecutor's house, where it was found by a person passing, who forwarded it to the prosecutor, and being left in the steward's room, he opened it and gave it to a constable, and the constable showed it to the prosecutor : the judges held this to be good evidence to go to the jury of a sending to the prosecutor; if a man leave a letter in any place, with intent that it shall be found, and ultimately delivered to the party for whom he intends it, that is a sending of it to the party. *R. v. Grimwade, 1 Car. & K. 502*. So, proof that the prisoner sent it to another person, with intent that such person should send or deliver it to the prosecutor, will support the allegation that he sent it to the prosecutor. *By the judges in R. v. Paddle, R. & Ry. 484. See R. v. Jones, 2 Car. & K. 398.*

It must be proved also that he knowingly did so, that is to say, that he knew the contents of the letter. If the letter be in the handwriting of the prisoner, of course it will be conclusive proof; but if not, evidence must be given from which the jury may presume it. Where it was proved that the defendant gave the letter, sealed, to another person to put into the post, who put it in, and it was delivered to the prosecutor : Hotham, B., put it to the jury, among other questions,

whether, from the prisoner's delivering the letter to the other person to put in the post, he did not know its contents, and they answered in the affirmative, and found the defendant guilty: and the judges afterwards held the conviction to be right. *Girdwood's case*, 2 *East*, P. C. 1120. 1 *Leach*, 169.

2. The letter being proved, must be read; and it will be for the jury to consider whether it contain, either expressly or impliedly, a demand, of and from the prosecutor, with menaces, and without any reasonable or probable cause, of the chattel, money, or valuable security mentioned in the indictment. It is not necessary that the letter should contain an express threat or menace; if the threat or menace can fairly be implied from it, it will be within the meaning of the statute. See *R. v. Boucher*, 4 *Car. & P.* 563. And other letters received by the prosecutor from the same party, before or after, may be given in evidence to explain anything ambiguous in the letter in question. *Robinson's case*, 2 *East*, P. C. 1110, 2 *Leach*, 869. But a letter referring in its terms to a sum of money in controversy between the prisoner and the prosecutor, which the latter had received, and the former insisted ought to be accounted for to him, was holden not to be a demand of money with menaces, within a former statute on this subject. *Heming's case*, 2 *East*, P. C. 116. So, a letter, offering for money to discover a conspiracy to destroy the property of the prosecutor, was holden not to be within the Act. *R. v. Pickford*, 4 *Car. & P.* 227. But the authority of this latter case has been much shaken by a recent case before the criminal appeal court, which was thus: upon an indictment on this section of the statute, it appeared that the prisoner wrote a letter to the prosecutors, who were bankers, in which after alluding to some former terms proposed by him, and to a "horrid catastrophe," which would not only stop their bank perhaps for ever, as the books would all be destroyed, as contemplated by the crackman or captain of "this horrid gang," he proceeded to point out a place where the bankers were to deposit a bag containing two hundred and fifty sovereigns, and concluded thus: "Let the money be lodged to-morrow (Saturday) morning by half-past eleven o'clock, but not one moment sooner, and all shall be well with you, but if I am at all deceived in any possible way, all must fall upon yourselves:" the judges held this clearly to be a letter within the meaning of the Act; they were all of opinion that a letter asking money, and using expressions calculated to make the other person part with it against his will, under the impression that mischief will happen if the application for the money be not complied with, is just that sort of demand which the statute contemplated. *R. v. Thomas Smith*, 2 *C. & K.* 882.

19 *Law J.* 80 *m.* Whether the letter, in its terms, impliedly contains menaces, is a question to be left to the jury. *Id.*

Stealing from the Person.

Indictment.

— } The jurors for our Lady the Queen, upon their
to wit. } oath present, that A. B., on the — day of —,
in the year of our Lord —, feloniously did steal, take, and
carry away from the person of C. D. certain money of the said
C. D., and one gold watch of the goods and chattels of the
said C. D.: against the form of the statute in such case made
and provided, and against the peace of our Lady the Queen,
her crown and dignity.

*Felony; transportation for not more than fifteen years
nor less than ten;—or imprisonment, [with or without hard
labour, s. 10] for not more than three years, 1 Vict. c. 87,
s. 5,—the imprisonment solitary for any part of the time,
but not more than one month at a time, or three months in
the year.*

Evidence.

To maintain this indictment, the prosecutor must prove—

1. A larceny of the property stated in the indictment, or some of it, as directed *ante*, pp. 371, 369, except that the taking must be actual, and not merely constructive; and the carrying away must be, not that mere removal of the property, which is sufficient in the case of simple larceny, but an actual severance of it from the person of the prosecutor. Where it appeared that the prisoner drew a pocket book out of the inside breast-pocket of the prosecutor's coat, about an inch above the top of the pocket; but the prosecutor suddenly putting his hand up, the prisoner let go the book, whilst it was still about the person of the prosecutor, and the book fell back again into the pocket: the judges held the offence of stealing from the person to be incomplete; this would be a sufficient asportation in simple larceny, but not so in larceny from the person. *R. v. Wm. Thompson, Ry. & M.* 78. So, where a thief was prevented from carrying off a purse, on account of some keys attached to the strings of it getting entangled in the owner's pocket, it was holden not to be a sufficient asportation. *R. v. Wilkinson*, 1 *Hale*, 508. 2 *East*, *P. C.* 556.

2. That the property was in the personal possession of the prosecutor at the time. Where a man went to bed with a

432 *Using Chloroform, for the purpose of Felony.*

prostitute, leaving his watch in his hat on a table, and she stole it whilst he was asleep, this was holden not to be a larceny from the person, but from the dwelling-house. *R. v. Hamilton*, 8 Car. & P. 49. And whether a taking, not actually from the person of the prosecutor, but in his presence, would be a stealing from the person, as in the case of robbery, has never been decided.

Using Chloroform, for the purpose of committing a Felony.

Indictment.

— } The jurors for our Lady the Queen, upon their
to wit. } oath present, that A. B., on the — day of —, in the year of our Lord —, unlawfully and feloniously did apply [*“apply or administer, or attempt to apply or administer,”*] certain chloroform [*“any chloroform, laudanum, or other stupifying or overpowering drug, matter or thing”*] to C. D., with intent thereby then to enable him the said A. B. [*or one E. F.*] to commit a felony [*“with intent thereby to enable such offender or any other person to commit, or with intent to assist such offender or other person in committing, any felony”*]: against the form of the statute in such case made and provided, and against the peace of our Lady the Queen, her crown and dignity. [*You may add a count stating the felony which was contemplated, but it does not seem to be necessary. If it be not certain that it was chloroform, you may add a count or counts stating it to be “a certain stupifying and overpowering drug and matter, to the jurors aforesaid unknown.”*]

Felony; transportation for life, or not less than seven years;—or imprisonment, with or without hard labour, for not more than three years. 14 & 15 Vict. c. 19, s. 3.

Evidence.

To maintain this indictment, the prosecutor must prove—

1. That the defendant applied or administered to him chloroform or other drug, as mentioned in the indictment. If the drug be not named, proof of its effect, showing that it was stupifying or overpowering, must be given.

2. The intent to commit a felony. Proof that whilst the prosecutor was so stupified or overpowered, a felony was committed,—as that he had certain money in his pocket when the chloroform, &c., was applied, and that when he recovered

he found it was gone, or the like,—will be good evidence to prove the intent. Or it may be proved from any other admission or acts of the defendant from which the jury may infer it.

6. Stealing in a Dwelling-house or Building.

Stealing in a Dwelling-house to the value of Five Pounds.

Indictment.

— } The jurors for our Lady the Queen, upon their
to wit. } oath present, that A. B., on the — day of —,
in the year of our Lord —, in the dwelling-house of C. D.,
in the parish of —, in the county of —, feloniously did
steal, take, and carry away certain money of the said C. D.,
and one gold watch and one pair of leather boots of the goods
and chattels of the said C. D., of the value in the whole of
five pounds and more, [*“chattels, money, or valuable security,
to the value of 5l. or more,”*] in the said dwelling-house
then being: against the form of the statute in such case made
and provided, and against the peace of our Lady the Queen,
her crown and dignity.

*Felony; transportation for not more than fifteen years,
nor less than ten;—or imprisonment, [with or without hard
labour, s. 3] for not more than three years, 1 Vict. c. 90,
s. 1, the imprisonment solitary, for not more than a month
at a time, or three months in a year. Id. s. 3.*

Evidence.

To maintain this indictment, the prosecutor must prove—

1. The larceny as in ordinary cases, (*see ante*, pp. 371, 369); but the value of the goods must be proved to be five pounds at the least. If you fail to prove them to be of that value, still the defendant may be convicted of the simple larceny. Upon an indictment for stealing sixty-eight yards of lace in a dwelling-house, it appeared that the prisoner, who was shopman to the prosecutor at Abingdon, sent the lace in a parcel by the coach from that place to London; the lace was in several pieces, none of which was separately worth 5l., but the whole together were worth much more; and as those pieces might have been stolen at different times, the prisoner's counsel suggested that, in *favorem vitæ*, they should be taken to be so; but Bolland, B., said that he could not assume that, as it was proved that the prisoner brought them all out of the prosecutor's house at the same time, and sent them in one parcel to London. *R. v. Jones*, 4 Car. & P. 217.

2. That the house in which the larceny was committed, was a dwelling-house, as in burglary, (*see ante*, p. 333), or some out-house or building within the same curtilage, occupied therewith, and having a communication with the dwelling-house, either immediate or by means of a covered or enclosed passage leading from the one to the other, as in burglary; 7 & 8 G. 4, c. 29, s. 13, *ante*, p. 335; and that it was the dwelling-house, &c., of C. D., *see ante*, p. 336, and situate as described in the indictment. *See ante*, p. 339. Where it appeared that the prosecutor formerly lived with his family in a house in St. Martin's-lane, where he carried on his business of an upholsterer; but he afterwards went with his family to live in the Haymarket, keeping the house in St. Martin's-lane as a warehouse and work-shop, two of his workwoman sleeping in it to take care of it; a larceny being committed in it, and the party convicted as for a larceny in a dwelling-house, the judges held that it could not be deemed the dwelling-house of the prosecutor. *R. v. Flannagan*, *R. & Ry.* 187. Where it appeared that the larceny was committed in a bed room over a stable, which was not under the same roof with the dwelling-house, nor communicated with it in the manner above mentioned, this was holden not to be a stealing in the dwelling-house. *R. v. Turner*, 6 Car. & P. 407.

The goods must also appear to have been under the protection of the house at the time of the larceny. Where it appeared that the prisoner Taylor, who lodged in the house of one Wakefield, having met an acquaintance in a public house, brought him home to sleep at his lodgings, and during the night stole his watch from the bed head; neither Wakefield nor his family knew of the prosecutor being there: upon an indictment for this offence, charging it as a larceny in the dwelling-house of Wakefield, it was doubted at first whether the prisoner could be convicted of a larceny in the dwelling-house, as the offence was committed in his own lodgings; but a majority of the judges held that the goods, although the property of the lodger's guest, were under the protection of the dwelling-house, and that the prisoner might therefore be convicted of stealing in the dwelling-house. *R. v. Taylor*, *R. & Ry.* 480. Even where a man, named James Bowden, was indicted for stealing goods to the value of five pounds, "in the dwelling-house of him the said James Bowden," and it appeared that the prosecutor, a hawker, had left his box of jewellery goods in the house of the prisoner, where he had lodged, and that the prisoner stole them: the judges unanimously held that this was a stealing in the dwelling-house. *R. v. Bowden*, 1 Car. & K. 147. And where the prosecutrix, residing at 38, Rupert-street, expected goods to be sent from Hanwell; they arrived in

London, and were carried from the coach office, by the regular porter, to the house of one Davidson, No. 33, Rupert-street, and Davidson imagining they were for the prisoner, who lodged in his house, delivered them to him, and he converted them to his own use, and absconded: it being doubted at first whether these goods were sufficiently under the protection of the house to constitute a stealing in the dwelling-house, the matter was referred to the judges; and they held that the goods were under the protection of the dwelling-house, and that the conviction of the prisoner on this charge was correct. *R. v. Carrol, Ry. & M.* 89. But if the property be under the immediate protection of the person of the owner or his bailee, and be stolen from him whilst in a dwelling-house, the offender cannot be indicted as for stealing in the dwelling-house; but the indictment must be for stealing from the person, or for a simple larceny. Even where it appeared that the prosecutrix sent her servant with a bank-note for twenty-five pounds to the apartments of the prisoner, who lodged in her house, and requested he would give her change of it; the prisoner said he had not sufficient gold, but he would go to his banker's and get it for her, and he went out with the note in his hand, but never returned: the judges held that this was not a larceny in the dwelling-house. *R. v. Campbell, 2 East, P. C.* 644. *2 Leach*, 642. So, in the case of ring dropping, if the parties be in a dwelling-house at the time the prosecutor deposits his money with the pretended finder, the offender cannot be indicted for stealing the money in the dwelling-house, because it was under the owner's protection at the time it was taken. *Owen's case, 2 East, P. C.* 645. But where the prosecutor went to a house with a girl, to sleep with her, and before he went to bed he put his watch in his hat and laid them on the table; and whilst he was asleep, the girl stole the watch and absconded: Parke, B., and Patteson, J., held this to be a stealing in the dwelling-house, as the watch could not be deemed to be under the personal protection of the prosecutor at the time. *R. v. Hamilton, 8 Car. & P.* 49.

If you fail in proving that the stealing was in a dwelling-house, or that the property was under the protection of the dwelling-house at the time, the defendant may be convicted of the simple larceny. *See ante*, p. 174.

Stealing in a Dwelling-house, and by Menaces putting some Person therein in bodily Fear.

Indictment.

— } The jurors for our Lady the Queen, upon their
to wit. } oath present, that A. B., on the — day of —,
in the year of our Lord —, in the dwelling-house of C. D.,

436 *Stealing Goods in Process of Manufacture.*

in the parish of —, in the county of —, feloniously did steal, take, and carry away certain money of the said C. D., and one gold watch, and one pair of leather boots of the goods and chattels of the said C. D., [*“any property,” that is, “chattels, money, or valuable security”*] in the said dwelling-house then being; and did then feloniously in the said dwelling-house, by menaces and threats [*“any menace or threat”*] put one Ann Smith, in the said dwelling-house then being, in bodily fear: against the form of the statute in such case made and provided, and against the peace of our Lady the Queen, her crown and dignity.

Felony; transportation for not more than fifteen years, nor less than ten;—or imprisonment [with or without hard labour, s. 7] for not more than three years, 1 Vict. c. 86, s. 5, the imprisonment solitary for not more than a month at a time, or three months in a year. Id. s. 7.

Evidence.

To maintain this indictment, the prosecutor must prove—

1. The larceny in the dwelling-house, as in the last case, except that the value of the article stolen is immaterial.

2. That the prisoner at the same time, by menaces or threats, put the person named in the indictment in bodily fear. If you fail to prove this, the defendant may be convicted of stealing in the dwelling-house to the value of five pounds, if the property stolen be laid and proved to be of that value, and the stealing proved to have been in the dwelling-house,—or of simple larceny, if the value be laid or proved under five pounds. *See ante*, p. 174.

Stealing from a Building, &c., Goods in the Process of Manufacture.

Indictment.

— } The jurors for our Lady the Queen, upon their
to wit. } oath present, that A. B., on the — day of —,
in the year of our Lord —, in a certain mill and building
of C. D. [*“building, field, or other place”*] in the parish
of —, in the county of —, feloniously did steal, take, and
carry away twenty yards of woollen cloth [*“any goods, or
article of silk, woollen, linen, or cotton, or of any one or more
of those materials mixed with each other, or mixed with
any other material”*] of the value of ten shillings and more,

of the goods and chattels of the said C. D., the said goods and chattels being then laid, placed, and exposed in the said mill and building, in a certain stage, process, and progress of manufacture: against the form of the statute in such case made and provided, and against the peace of our Lady the Queen, her crown and dignity.

Felony; transportation for not more than fifteen years, nor less than ten; or imprisonment, [with or without hard labour, s. 3], for not more than three years, 1 Vict. c. 90, s. 2, the imprisonment solitary for not more than a month at a time, or three months in a year. Id. s. 3.

Evidence.

To maintain this indictment, the prosecutor must prove—

1. The larceny as in ordinary cases; *see ante*, pp. 371, 369; except that you must prove the value to be ten shillings at the least. If you fail in proving the goods to be of this value, still the defendant may be convicted of the simple larceny.

2. That the goods were stolen from the “building, field, or other place” in the indictment mentioned. If you fail to prove this, the defendant may still be convicted of the simple larceny.

3. That at the time they were stolen, they were “laid, placed, or exposed” in the “building, field, or other place,” in a certain “stage, process, or progress of manufacture,” as stated in the indictment. If you fail to prove this, the defendant may still be convicted of the simple larceny.

7. Stealing from Ships, Wharfs, &c.

Stealing from a Vessel on a navigable River, &c.

Indictment.

— } The jurors for our Lady the Queen, upon their
to wit. } oath present, that A. B., on the — day of —,
in the year of our Lord —, feloniously did steal, take, and
carry away fifty pounds weight of cloves, of the goods and mer-
chandize of C. D., [*“any goods or merchandize”*] in a certain
ship and vessel [*“vessel, barge, or boat of any description
whatsoever”*] upon a certain navigable river called the —
[*“in any port of entry or discharge, or upon any navigable*

river or canal, or in any creek belonging to or communicating with any such port, river, or canal:"] then being: against the form of the statute in such case made and provided, and against the peace of our Lady the Queen, her crown and dignity. [*If the river or canal constitute the boundary of two counties, the venue may be laid in either county.* 7 G. 4, c. 64, s. 13, ante, p. 65.

Felony; 7 & 8 G. 4, c. 29, s. 17; *transportation for not more than fifteen years, nor less than ten;—or imprisonment, [with or without hard labour, s. 3] for not more than three years, 1 Vict. c. 90, s. 2, the imprisonment to be solitary for not more than a month at a time, and not more than three months in a year.* Id. s. 3.

Evidence.

To maintain this indictment, the prosecutor must prove—

1. The larceny, as directed *ante*, pp. 371, 369. From the circumstance of the statute mentioning "goods and merchandize" only, and not "chattel, money, or valuable security," as in other sections, it was evidently the intention of the legislature that it should extend only to such goods, as ships, &c., are laden with for the purpose of carriage. But the luggage of a passenger in a steam boat, has been holden to come within these words "goods and merchandize," and the offence of stealing it to be within this section of the statute. *R. v. Wright*, 7 Car. & P. 159. If, however, the goods stolen appear, upon evidence, to be of a different description, still the prisoner may be convicted of simple larceny.

2. That the larceny was committed in the "vessel, barge, or boat" described in the indictment. It seems to be immaterial whether the prisoner succeeded in getting the goods from on board the vessel or not; the words of the statute being—"if any person shall steal any goods or merchandize in any vessel," &c. But a man cannot be guilty of this offence in his own ship. Upon an indictment on the repealed statute, 24 G. 2, c. 45, (which is the same as the present section), it appeared that the prisoner was not only master, but also owner, of the vessel in which the alleged larceny was committed; and the judges held that even if it were a larceny, still, as the prisoner was the owner of the vessel, it was not a case within the meaning of the statute. *R. v. Maddox*, R. & Ry. 92.

3. That the vessel was, at the time, upon the navigable river, &c., described in the indictment.

Stealing from a Dock, Wharf or Quay.

Indictment.

— } The jurors for our Lady the Queen, upon their
to wit. } oath present, that A. B., on the — day of —
in the year of our Lord —, feloniously did steal, take, and
carry away fifty pounds weight of cloves, of the goods and
merchandize of C. D. [*“goods or merchandize”*] from a cer-
tain dock called — [*“dock, wharf, or quay, adjacent to any
port of entry or discharge, or any navigable river or canal,
or to any creek belonging to or communicating with any
such port, river, or canal”*] in the parish of —, in the
county of —, adjacent to a certain navigable river called
—: against the form of the statute in such case made and
provided, and against the peace of our Lady the Queen, her
crown and dignity.

*Felony; 7 & 8 G. 4, c. 29, s. 17; transportation for not
more than fifteen years nor less than ten; or imprisonment
[with or without hard labour, s. 3], for not more than three
years, 1 Vict. c. 90, s. 2, the imprisonment to be solitary for
not more than a month at a time, and not more than three
months in a year. Id. s. 3.*

Evidence.

To maintain this indictment, the prosecutor must prove—

1. The larceny, as directed *ante*, pp. 371, 369. From the
circumstance of the statute mentioning only, “goods or mer-
chandize,” and not “chattel, money, or valuable security”
as in other sections, it was evidently the intention of the legisla-
ture to confine the section on which this indictment is framed,
to such goods only as are landed from ships in docks, or on
wharfs or quays, or are there for the purpose of being ship-
ped, (including perhaps the luggage of passengers, *see R. v.
Maddox, ante*, p. 438,) or which are deposited there for safe
custody, and not to every article which may happen to be on
them at the time. Whether it extends to larcenies on board
ships in docks, has never, I believe, been decided; but if the
dock is to be considered part of the “*port of entry or dis-
charge*,” the indictment should be for stealing from the ves-
sel, as in the last case, and not from the dock; or if the goods
were stolen from the ship, when there was no person belonging
to her on board, perhaps counts stating the offence in both
ways, may be prudent.

440 *Stealing from a Ship in Distress, or Wrecked.*

2. That the goods were stolen from the dock, wharf, or quay described in the indictment. It may be doubted whether a larceny is within the meaning of this part of the Act, if the prisoner be detected, or abandon the stolen article, before he has carried it from the dock, wharf, or quay in question. The first part of sect. 17 of stat 7 & 8 G. 4, c. 29, relates to stealing in a ship, &c.; and the latter part, to stealing *from* a dock, &c.: in the first case, any, the slightest asportation will be sufficient to constitute the offence, as in other cases of larceny; in the latter perhaps not. It should seem also, that a larceny by the owner of the dock, wharf, or quay, would not be within the meaning of the statute; in like manner as it has been decided that a larceny in a ship by the captain and owner of it, is not within the first part of the section. *R. v. Maddox, ante*, p. 438. But a larceny by his servant most undoubtedly would be within it.

3. That the dock, wharf, or quay, is adjacent to the navigable river, &c., mentioned in the indictment, and is situate in the parish, &c.

Stealing from a Ship in distress or wrecked.

Indictment.

— } The jurors for our Lady the Queen, upon their
to wit. } oath present, that on the — day of —, in the
year of our Lord —, a certain ship and vessel [*“ship or vessel”*] the property of some person to the jurors aforesaid unknown, was stranded and cast on shore [*“in distress or wrecked, stranded or cast on shore;”*] and that A. B. afterwards, on the day and year aforesaid, feloniously did plunder, steal, take, and carry away, twenty oak planks, being parts of the said vessel, and fifty pounds weight of cloves, being goods, merchandize, and articles [*“goods, merchandize, or articles of any kind”*] belonging to the said ship and vessel, so then stranded and cast ashore, of the goods and chattels of some person to the jurors aforesaid unknown: against the form of the statute in such case made and provided, and against the peace of our Lady the Queen, her crown and dignity. [*Add other counts, if necessary, stating the ship to have been “in distress” or “wrecked.” As to the venue, see ante*, p. 71.

Felony; transportation for not more than fifteen years, nor less than ten;—or imprisonment, [with or without hard labour, s. 10], for not more than three years, 1 Vict. c. 87, s. 8, the imprisonment solitary for not more than a month at a time, nor more than three months in a year. Id. s. 10. Accessories before the fact, the same punishment; access-

ries after the fact, imprisonment for not more than two years, Id. s. 6, solitary and with hard labour as above mentioned. Id. s. 10.

Evidence.

To maintain this indictment, the prosecutor must prove—

1. That the ship or vessel was stranded or cast ashore, as stated in the indictment.

2. The larceny, as *ante*, pp. 371, 369.

3. That the goods belonged to the ship, or were part of the ship, as mentioned in the indictment.

As to malicious injuries to ships or wreck, *see post*.

8. Stealing by Tenants and Lodgers.

Indictment.

By stat. 7 & 8 G. 4, c. 29, s. 45, “if any person shall steal any chattel or fixture, let to be used by him or her in or with any house or lodging, (whether the contract shall have been entered into by him or her, or by her husband, or by any person on behalf of him or her or her husband”): felony, same punishment as in the case of simple larceny; “and in every such case of stealing any chattel, it shall be lawful to prefer an indictment in the common form as for larceny; and in every such case of stealing any fixture, to prefer an indictment in the same form, as if the offender were not a tenant or lodger; and in either case, to lay the property in the owner or person letting to hire.”

See the form of an indictment for larceny, ante, p. 354; and of an indictment for stealing a fixture, ante, p. 411.

Felony; imprisonment, [with or without hard labour, and the imprisonment solitary for the whole or any portion of the time,] for not more than two years, and, if a male, to be once, twice, or thrice publicly or privately whipped, if the court shall think fit. Ante, p. 355.

But if the goods or fixtures be laid and proved to be of value exceeding the sum of five pounds, then the punishment shall be the same as before the passing of stat. 12 Vict. c. 11, by which the punishment of transportation was taken away from simple larceny. 12 Vict. c. 11, s. 2. And before that statute, the punishment for stealing any chattel or fixture, of any value, by a tenant or lodger, we have seen (supra)

was the same as in the case of simple larceny, that is to say:—transportation for seven years;—or imprisonment [with or without hard labour, and the imprisonment solitary for the whole or any part of the time, s. 4] for not more than two years, and, if a male, to be once, twice, or thrice publicly or privately whipped, if the court shall think fit. 7 & 8 G. 4, c. 29, s. 3. But in that case, it will be necessary to state in the indictment that the goods or fixtures were “of a value exceeding the sum of five pounds, to wit, of the value of——,” and also to add, before the conclusion,—“which said goods and chattels [or fixture, whatever it may be] were, before and at the time of the committing of the felony aforesaid, let to the said A. B. by the said C. D., to be used by the said A. B., [in and] with a certain house [or lodging];” for otherwise the defendant would be liable only to the present punishment for larceny. See ante, p. 355.

Evidence.

In ordinary cases, the evidence in support of an indictment for stealing goods, is the same as in simple larceny, the taking being actual, and not merely constructive; see ante, pp. 371, 369; and for stealing fixtures, the evidence is the same as directed, ante, p. 412. It does not seem to be necessary to prove the letting, &c., for it is not stated in the indictment, and it would not be matter of defence if proved by the defendant. But where the value is alleged to exceed five pounds, as above mentioned, it must be proved that the goods or fixtures stolen had been let by the prosecutor to the defendant, to be used in or with a house or lodging, as stated in the indictment, to bring the case within stat. 12 Vict. c. 11, s. 2.

9. Stealing by Clerks or Servants.

Indictment.

—— } The jurors for our Lady the Queen, upon their
to wit. } oath present, that before and at the time of the
committing of the offence hereinafter [next] mentioned, A. B.
was clerk [or servant] to one C. D.; and that the said A. B.
whilst he was such clerk to the said C. D., to wit, on the ——
day of ——, in the year of our Lord ——, feloniously did
steal, take, and carry away certain money of the said C. D.,
and fifty yards of woollen cloth of the goods and chattels of
the said C. D., his said master, as aforesaid: against the form
of the statute in such case made and provided, and against the

peace of our Lady the Queen, her crown and dignity. [*If it be doubtful whether the money or goods stolen be the property of the master, add another count, thus :*] And the jurors aforesaid, upon their oath aforesaid, do further present, that before and at the time of the committing of the offence herein-after mentioned, the said A. B. was clerk [*or servant*] to the said C. D.; and that the said A. B., whilst he was such clerk to the said C. D., to wit, on the day and year aforesaid, feloniously did steal, take, and carry away certain other money, and fifty yards of woollen cloth, then being in the possession and power of the said C. D., his master, as aforesaid : against the form of the statute in such case made and provided, and against the peace of our Lady the Queen, her crown and dignity.

Felony ; transportation for not more than fourteen years, nor less than seven ;—or imprisonment [with or without hard labour, s. 4] for not more than three years, and, if a male, to be once, twice, or thrice publicly or privately whipped, if the court think fit. 7 & 8 G. 4, c. 22, s. 46.

Evidence.

To support this indictment, the prosecutor must prove—

1. That at the time of the larceny, the defendant was in his service, as clerk or servant, as stated in the indictment.

Servants, having the bare custody or charge of the goods of their master, are not bailees ; and if they dispose of the goods to their own use, they are guilty of larceny. If a gentleman's butler, having the care and custody of his plate, or his shepherd of his sheep, dispose of them to their own use, they are as much guilty of larceny, as if they took them out of the actual custody of their master. 1 *Hale*, 506. 1 *Hawk. c.* 33, s. 6. So, if a carter go away with his master's cart, *Robinson's case*, 2 *East, P. C.* 565, or a porter, with goods which his master sends by him to a customer, *Bass's case*, 2 *East, P. C.* 566. 1 *Leach*, 285, or a servant, with money entrusted to him by his master to take to another person, *Lavender's case*, 2 *East, P. C.* 566, or a clerk, with a bill of exchange, &c., delivered to him to send or take to a banker's, *R. v. Paradise*, 2 *East, P. C.* 565. *R. v. Chipchase*, 2 *East, P. C.* 567. 2 *Leach*, 805, or a bargeman, with his master's corn, which he is conveying from a ship to his master's warehouse, *R. v. Abrahams*, 2 *East, P. C.* 569. *Spear's case*, *Id.* 568, or a clerk to a banker or merchant, with money of which he has the care, or to which he has access, 1 *Hawk. c.* 33, s. 7, or the like :—in all these cases the butler, shepherd, carter, porter, servant, bargeman, and clerk, respectively, are guilty of larceny, no matter at what time they had the *animus furandi*,

whether at the time of the delivery of the goods, &c., to them, or afterwards. Where it appeared that the prosecutor hired the prisoner to take a canal boat from Stourbridge to Ellesmere port, and paid him five pounds for his wages in advance, and for the keep of the towing horse, and also gave him a separate sum of three sovereigns to pay the tonnage dues on the canal; the prisoner took the boat sixteen miles only on the way, there left it, paid two pounds for the dues, and appropriated the other sovereign to his own use: it was objected for the prisoner that the relation of master and servant did not exist between him and the prosecutor, and therefore he could not be convicted; but Patteson, J., thought otherwise; he said that if a man employ another to go somewhere with his horse, for a certain price, that other is, for that purpose, his servant; and if in addition he give him a distinct and separate sum of money to be disbursed in a particular way, and instead of doing so, he appropriate it to his own use, that is felony. *R. v. Goode, Car. & M. 582.* But where it appeared that the prisoner acted as nurse to the prosecutor's daughter who was sick, and had her board and lodging in the house, receiving occasionally small presents of money for her services, but no wages,—Coleridge, J., held that she was not a servant within the meaning of the Act. *R. v. Frances Smith, 1 Car. & K. 423.* So, where the prosecutor gave his waistcoat to the prisoner to take to a laundress to be washed, and he did so, but told the laundress it was his own; when it was washed, the laundress delivered it to him, and he converted it to his own use: this was treated as a case of a bailee, not a servant, and the judge left it to the jury whether the prisoner had a felonious intent to convert the waistcoat to his own use at the time he received it from the prosecutor; and the jury finding that he had not, he was acquitted. *R. v. Evans, Car. & M. 632.* There is sometimes a difficulty in distinguishing whether a person to whom goods are entrusted is a bailee or a servant, particularly in the case of persons employed to drive cattle from one place to another. Where the party so entrusted is a drover by trade, and by the custom of the trade he may drive the cattle of several persons at the same time, if he be employed as drover, this rebuts the presumption of his being a mere servant, and he must be deemed to be a bailee: *see ante*, pp. 382—385; but if he be not a drover, but merely a person employed by a man to drive his cattle from one place to another, for wages, he may be deemed and treated as the employer's servant *pro hac vice*. *See Goode's case, supra.* So, where the prisoner, who was not otherwise in the prosecutor's service, was employed by him to take six pigs from Cardiff to Usk fair, and on the way he called at the house of a Mr. Matthews, and left one of the pigs there, saying that it was too tired to travel further; he

saw the prosecutor the next morning, told him of it, and the prosecutor sent him to Matthews, to desire him to keep the pig for a few days; he went accordingly, but instead of doing as the prosecutor had desired him, he sold the pig to Matthews, and received the price, but told the prosecutor that he had seen the pig at Matthews's, who would keep it for him: Cresswell, J., held that this was clearly not larceny. *R. v. Jones, Car. & M. 611.*

2. That the prisoner stole the money or goods specified in the indictment, or some of them. This is proved in the ordinary way, as directed, *ante*, pp. 371, 369. Where a servant was entrusted with six shillings, to buy twelve hundred weight of coals, but he bought a less quantity, for which he paid three shillings and threepence, and appropriated one of the remaining shillings to his own use: this was holden to be larceny. *R. v. Beaman, Car. & M. 595. See R. v. Butler, 2 Car. & K. 340.* Where a clerk at a banker's, by giving fictitious credit in the books to a customer for a certain amount, and getting the customer's cheque for that amount, took bank-notes out of the till in exchange for the cheque: the jury having found that he made the false entries of credit in the books, fraudulently, for the purpose of obtaining the money from the banker, the judges held this to be larceny. *R. v. Hammon, R. & Ry. 221.* And where the servant of a manufacturer, knowing that her master frequently wanted change for gold, told the master's wife that if she would give her ten guineas, she would get silver for them; the wife accordingly gave her the ten guineas, and she absconded with them: this was holden to be larceny. *R. v. Atkinson, 1 Leach, 303 n.* But where upon an indictment for a larceny by a servant, charging in one count a stealing of a bank note for five pounds, and in another the stealing of silver coin to that amount, it appeared that the prisoner, being sent by his masters, the prosecutors, to get change of a five-pound note, got silver for it from a neighbour, but absconded with the silver: being convicted on the second count, the judges held the conviction to be wrong, because the silver had never been in the possession of the masters, except by the hands of the prisoner; they said that he should have been indicted for embezzlement. *R. v. Sullens, Ry. & M. 129.* So, in all cases where a clerk or servant embezzles any chattel, money, or valuable security, received by him, for or in the name of his master, which was not received into the possession of the master otherwise than by the possession of such clerk or servant, the indictment should in strictness be for embezzlement, and not for larceny. And therefore, where a servant, serving in his master's shop, received money from a customer for some articles sold to him, and instead of putting the whole of the money into the till, he

put a part only, and put the rest in his pocket: being indicted for this as larceny, the judges held it to be embezzlement, not larceny. *Bull's case*, 2 *East*, P. C. 572, *cit.* But now this is of little importance; for by stat. 14 & 15 Vict. c. 100, s. 13, "if upon the trial of any person indicted for larceny, it shall be proved that he took the property in question in any such manner as to amount in law to embezzlement, he shall not by reason thereof be entitled to be acquitted, but the jury shall be at liberty to return as their verdict, that such person is not guilty of larceny, but is guilty of embezzlement."

3. That the money or goods were, at the time they were taken, either the property of C. D., or in his possession or power, as stated in the indictment.

10. *Embezzlement.*

Embezzlement by a Clerk or Servant.

Indictment.

— } The jurors for our Lady the Queen, upon their
to wit. } oath present, that A. B., on the — day of —,
in the year of our Lord —, being then a clerk [*"clerk or
servant,—or any person employed for the purpose or in the
capacity of a clerk or servant"*] to C. D., did by virtue of
such his employment, then and whilst he was so employed as
aforesaid, receive and take into his possession certain money
[*"chattel, money, or valuable security"*] for and in the name
and on the account of the said C. D., his master as aforesaid,
and did then fraudulently and feloniously embezzle the said
money; and so the jurors aforesaid upon their oath aforesaid do
say, that the said A. B. then, in manner and form aforesaid,
feloniously did steal, take, and carry away the said money the
property of the said C. D., from the said C. D., his master as
aforesaid: against the form of the statute in such case made
and provided, and against the peace of our Lady the Queen,
her crown and dignity. [*As it is permitted to the prosecutor,
by the statute, to charge the offender with any number of
distinct acts of embezzlement, not exceeding three, which
may have been committed by him against the same master,
within the space of six calendar months from the first to
the last of such acts, (7 & 8 G. 4, c. 29, s. 48), if it be in-
tended to charge him thus with other offences, let the second
and third counts of the indictment be thus:* And the jurors
aforesaid upon their oath aforesaid do further present, that the
said A. B., afterwards, and within six calendar months from

the time of the committing of the said offence in the said first count of this indictment charged and stated, to wit, on the — day of —, in the year aforesaid, being then a clerk to the said C. D., did by virtue of such his said last-mentioned employment, then and whilst he was so employed as last aforesaid, receive and take into his possession certain other money for and in the name and on the account of the said C. D., as aforesaid, and did then and within the six calendar months last aforesaid fraudulently and feloniously embezzle the said last-mentioned money; and so the jurors aforesaid upon their oath aforesaid do say, that the said A. B. then, in manner and form aforesaid, feloniously did steal, take, and carry away the said last-mentioned money, the property of the said C. D., from the said C. D., his master as last aforesaid: against the form of the statute in such case made and provided, and against the peace of our Lady the Queen, her crown and dignity. *[Add a third count, in the same form as the second, if necessary. As to the venue, see ante, p. 69. Where the three offences were stated in one count, the receipts separately, and then the embezzlement "on the several days aforesaid" of the sums respectively received by him on each of those days: on demurrer Patteson, J., held the indictment to be bad; he thought it bad as including the three offences in one count, but it was decidedly bad as showing the receipts only, and not the embezzlement, of the two last sums, to have been within six calendar months from the commission of the first offence. R. v. Purchase, Car. & M. 617. And where the indictment contained three counts, the second and third counts were holden bad by Cresswell, J., for showing merely that the receipts, and not the embezzlements, were within the six months. R. v. Noake, 2 Car. & K. 620.]*

By stat. 7 & 8 G. 4, c. 29, s. 48, in every such indictment, when the offence shall relate to a chattel, it shall be sufficient to allege the embezzlement to be of money, without specifying any particular coin or valuable security; and such allegation, so far as regards the description of the property, shall be sustained, if the offender shall be proved to have embezzled any amount, although the particular species of coin or valuable security, of which such amount was composed, shall not be proved;—or if he shall be proved to have embezzled any piece of coin or valuable security, or any portion of the value thereof, although such piece of coin or valuable security may have been delivered to him, in order that some part of the value thereof should be returned to the party delivering the same, and such part shall have been returned accordingly. The same has also lately been enacted by stat. 14 & 15 Vict. c. 100, s. 18, (ante, p. 90), except that the latter statute does not relate to valuable securities, other than bank-notes.

put a part only, and put the rest in his pocket: being indicted for this as larceny, the judges held it to be embezzlement, not larceny. *Bull's case*, 2 *East*, P. C. 572, cit. But now this is of little importance; for by stat. 14 & 15 Vict. c. 100, s. 13, "if upon the trial of any person indicted for larceny, it shall be proved that he took the property in question in any such manner as to amount in law to embezzlement, he shall not by reason thereof be entitled to be acquitted, but the jury shall be at liberty to return as their verdict, that such person is not guilty of larceny, but is guilty of embezzlement."

3. That the money or goods were, at the time they were taken, either the property of C. D., or in his possession or power, as stated in the indictment.

10. *Embezzlement.*

Embezzlement by a Clerk or Servant.

Indictment.

— } The jurors for our Lady the Queen, upon their
to wit. } oath present, that A. B., on the — day of —,
in the year of our Lord —, being then a clerk [*"clerk or
servant,—or any person employed for the purpose or in the
capacity of a clerk or servant"*] to C. D., did by virtue of
such his employment, then and whilst he was so employed as
aforesaid, receive and take into his possession certain money
[*"chattel, money, or valuable security"*] for and in the name
and on the account of the said C. D., his master as aforesaid,
and did then fraudulently and feloniously embezzle the said
money; and so the jurors aforesaid upon their oath aforesaid do
say, that the said A. B. then, in manner and form aforesaid,
feloniously did steal, take, and carry away the said money the
property of the said C. D., from the said C. D., his master as
aforesaid: against the form of the statute in such case made
and provided, and against the peace of our Lady the Queen,
her crown and dignity. [*As it is permitted to the prosecutor,
by the statute, to charge the offender with any number of
distinct acts of embezzlement, not exceeding three, which
may have been committed by him against the same master,
within the space of six calendar months from the first to
the last of such acts, (7 & 8 G. 4, c. 29, s. 48), if it be in-
tended to charge him thus with other offences, let the second
and third counts of the indictment be thus:* And the jurors
aforesaid upon their oath aforesaid do further present, that the
said A. B., afterwards, and within six calendar months from

the time of the committing of the said offence in the said first count of this indictment charged and stated, to wit, on the — day of —, in the year aforesaid, being then a clerk to the said C. D., did by virtue of such his said last-mentioned employment, then and whilst he was so employed as last aforesaid, receive and take into his possession certain other money for and in the name and on the account of the said C. D., as aforesaid, and did then and within the six calendar months last aforesaid fraudulently and feloniously embezzle the said last-mentioned money; and so the jurors aforesaid upon their oath aforesaid do say, that the said A. B. then, in manner and form aforesaid, feloniously did steal, take, and carry away the said last-mentioned money, the property of the said C. D., from the said C. D., his master as last aforesaid: against the form of the statute in such case made and provided, and against the peace of our Lady the Queen, her crown and dignity. [*Add a third count, in the same form as the second, if necessary. As to the venue, see ante, p. 69. Where the three offences were stated in one count, the receipts separately, and then the embezzlement "on the several days aforesaid" of the sums respectively received by him on each of those days: on demurrer Patteson, J., held the indictment to be bad; he thought it bad as including the three offences in one count, but it was decidedly bad as showing the receipts only, and not the embezzlement, of the two last sums, to have been within six calendar months from the commission of the first offence. R. v. Purchase, Car. & M. 617. And where the indictment contained three counts, the second and third counts were holden bad by Cresswell, J., for showing merely that the receipts, and not the embezzlements, were within the six months. R. v. Noake, 2 Car. & K. 620.*]

By stat. 7 & 8 G. 4, c. 29, s. 48, in every such indictment, when the offence shall relate to a chattel, it shall be sufficient to allege the embezzlement to be of money, without specifying any particular coin or valuable security; and such allegation, so far as regards the description of the property, shall be sustained, if the offender shall be proved to have embezzled any amount, although the particular species of coin or valuable security, of which such amount was composed, shall not be proved;—or if he shall be proved to have embezzled any piece of coin or valuable security, or any portion of the value thereof, although such piece of coin or valuable security may have been delivered to him, in order that some part of the value thereof should be returned to the party delivering the same, and such part shall have been returned accordingly. The same has also lately been enacted by stat. 14 & 15 Vict. c. 100, s. 18, (ante, p. 90), except that the latter statute does not relate to valuable securities, other than bank-notes.

But the indictment must state the thing embezzled to be the property of the master. Where the indictment stated that the prisoner, being clerk to the prosecutors, received a certain sum on their account, and embezzled it, concluding in the usual way, that he stole the money "from the said masters and employers of him the said" prisoner, on whose account he had so received the same, but it did not state expressly whose property the money was: the judges held this to be insufficient, and that the indictment should have stated the money to be the property of some person, namely, the master, as in common cases of larceny. R. v. M'Gregor, R. & Ry. 23. Where, by a local Act certain inhabitants of seven parishes were incorporated by the name of "the guardians of the poor" of those parishes, twelve directors were to be appointed out of the guardians, and the property of the corporation was vested in "the directors for the time being," who were to execute the powers of the Act: the prisoners being indicted for embezzling money of "the directors of the poor of the said parishes," the judges held the indictment to be wrong; that it should have stated it to be the money of the guardians by their corporate name, or of the directors by their individual names. R. v. Beacall, Ry. & M. 15. See ante, p. 82.

It is not actually necessary that the indictment should state that the defendant "feloniously" embezzled the property, if the conclusion of the indictment state that he feloniously stole it. R. v. Crighton, R. & Ry. 62. It is usual, however, and more prudent, to use the word "feloniously" in both places.

Also, it is not usual or necessary to state from whom the money was received. Where an objection on this ground was taken to an indictment in arrest of judgment, the question was reserved for the opinion of the judges; and they were unanimously of opinion that the indictment was sufficient. R. v. Beacall, 1 Car. & P. 454. But as this may in some cases operate as a hardship upon the prisoner, in not disclosing to him sufficiently the offence or offences with which he is charged, the judge, before whom the prisoner is to be tried, will, upon application, order the prosecutor to furnish the prisoner with the particulars of the charge. R. v. Bootyman, 5 Car. & P. 300, cor. Littledale, J. R. v. Hodgson, 3 Car. & P. 422, S. P. cor. Vaughan, B.

Felony; transportation for not more than fourteen years, nor less than seven;—or imprisonment [with or without hard labour, s. 4], for not more than three years, and, if a male, to be once, twice, or thrice publicly or privately whipped, if the court shall think fit. 7 & 8 G. 4, c. 29, ss. 47, 46.

Evidence.

The offence, as defined by the statute, is thus "If any clerk,—or servant,—or any person employed for the purpose or in the capacity of a clerk or servant,—shall by virtue of such employment,—receive or take into his possession—any chattel, money, or valuable security,—for or in the name or on account of his master,—and shall fraudulently embezzle the same or any part thereof." To maintain this indictment, therefore, the prosecutor must prove—

1. That the prisoner was "clerk or servant, or person employed for the purpose or in the capacity of a clerk or servant" to the prosecutor, at the time of the receipt and embezzlement. A female servant is within the meaning of the Act. *R. v. Elizabeth Smith, R. & Ry.* 267. So is an apprentice, although under age. *R. v. Mellish, R. & Ry.* 80. So is a farm bailiff. *R. v. Wortley, 15 Shaw's J. P.* 785. Where a man was employed by a township, as their accountant and treasurer, and he received and paid all money receivable or payable on their account; in the course of which employment he received a sum of money on account of the overseers, and embezzled it; the judges held that he was a clerk and servant within the meaning of the Act. *R. v. Squire, R. & Ry.* 349. So, a treasurer to the guardians of the poor of a parish, appointed by them by virtue of a local Act, has been holden to be a servant of the guardians. *R. v. Welch, 2 Car. & K.* 296. So is a collector of poor-rate, appointed by overseers, a servant of the overseers. *R. v. Adey, 19 Law J.* 149 *m.* And see *R. v. Callahan, 8 Car. & P.* 154. But where a man was appointed assistant-overseer of a district comprising several townships, by the guardians of the union, by order of the poor-law commissioners, and his duty was to assist the overseers of the different townships, and he was paid a salary by the guardians; he received sums for poor-rate from rate-payers in the township of F. (one of the townships in the district), and it was his duty to have paid them into a banker's, to the credit of the overseers of that township, but he embezzled them: being indicted, the judges held that he could not be convicted on the count stating him to be servant of the overseers, for he was appointed and paid by the guardians; and that he could not be convicted on a count stating him to be a servant of the guardians, for it was not their money he embezzled. *R. v. Townsend, 2 Car. & K.* 168. So, where the clerk of a chapelry was indicted for embezzling money collected by him from the communicants on Sacrament Sunday, and which was for the relief of the poor, the indictment stating him in one count to be the servant of the clergyman, and in another of the church-

wardens: the judges held that he could not be deemed the servant of one or the other. *R. v. Burton, Ry. & M.* 237. And it is not material whether the servant be paid by certain wages, or by a per centage on the receipts, or by a share of the profits arising from his labour. Where, upon an indictment for embezzlement, it appeared that the prisoner was employed by the prosecutor as master of one of his ships, to take coals from his colliery and sell them, and he was to have a certain proportion of the profits, after deducting the price of the coals at the colliery, for his labour; he took a cargo of coals, sold them, received the price, and absconded with it: a majority of the judges held that he was a servant of the prosecutor, within the meaning of the Act. *R. v. Hartley, R. & Ry.* 139. So, where the prisoner was employed by the prosecutors as traveller, to take orders for goods and collect money for them from their customers, and was paid by a per centage upon the amount of the orders he obtained; he did not live with them or act in their counting house; he paid his own expenses on his journeys, and he was employed as traveller by several other houses besides: the judges held that he was a clerk to the prosecutors, within the meaning of the Act. *R. v. Carr, R. & Ry.* 198. So where the collector of a poor-rate was paid by a per centage on the rates, and it was objected that he was therefore no clerk or servant within the meaning of the Act,—Richardson, J., over-ruled the objection. *R. v. Ward, Gow,* 168. It is immaterial, also, whether the employment be permanent, or occasional only, or even confined merely to the particular instance. Where it appeared that the prisoner had applied to the prosecutor for employment, who agreed to let him carry out parcels, and go of messages when he should have nothing else to do, for which the prosecutor was to pay him what he should think fit; the prosecutor gave him an order, to receive the sum of two pounds for him; he received it and embezzled it: the judges held him to be a servant to the prosecutor, within the meaning of the Act. *R. v. Spencer, R. & Ry.* 299. So, where it appeared that a farmer, having beasts at Smithfield, of which the prisoner had the keeping as drover, sent the prisoner to deliver a cow to a purchaser, and to receive the money, and the prisoner received and embezzled it: the judges held that the prisoner was a servant within the meaning of the Act. *R. v. Hughes, Ry. & M.* 370. In a case previously decided, where the prosecutor had sent the prisoner with a cheque to a banker's for payment, and he received the money and embezzled it, it appeared that although the prisoner had been employed by the prosecutor, sometimes as a regular labourer, sometimes as a roundsman for a day at a time, and on several occasions had been sent to receive the amount of cheques from the banker's, he was not at the time in question in the prosecutor's employment, but was to re-

ceive sixpence for going to the banker's : Parke, J., (after consulting Taunton, J.,) held that he was not a clerk or servant within the meaning of the Act. *R. v. Freeman*, 5 Car. & P. 534. But see *Good's case*, ante, p. 444.

Where a man is the clerk or servant of partners, he is deemed the clerk and servant of all and of each of the partners ; and if he receive money for or on the private account of any one of them, and embezzle it, he may be indicted under this statute. *R. v. Leach*, 3 Stark. N. P. C. 70. The clerk of a joint stock company, is the clerk and servant of the directors who appoint him ; and where such a clerk, having the care and custody of the cheques paid and cancelled by the company's banker, embezzled one of them, and was charged in the indictment as having embezzled a piece of paper the property of the company, and convicted, the court held that he was properly convicted, although he himself was a shareholder in the company. *R. v. Watts*, 19 Law J. 192 m. *R. v. Atkinson*, Car. & M. 525. The clerk of a corporate body,—of the guardians of a poor-law union for instance,—is a clerk within the meaning of this statute, whether duly appointed or not. *R. v. Beacall*, 1 Car. & P. 457. A clerk to a savings' bank, may be charged as clerk to the trustees, though appointed by the managers. *R. v. Jenson*, Ry. & M. 434. So the clerk of a benefit society may be charged as the clerk and servant of the trustees. *R. v. Hall*, Ry. & M. 474.

2. That he received the money, &c., or took it into his possession. That he received it, is usually proved by the person who paid it to him, or by his own admission. If chattels be specified in the indictment as having been received by the prisoner, the things described, or part of them, must be proved in the same manner as in larceny ; but if the indictment state a receipt and embezzlement of money, you may give in evidence any species of coin, or any such valuable security as is mentioned ante, pp. 391, 392, or you may prove a certain amount in money or securities, although you are not able to prove of what coin or of what valuable securities it consisted. See ante, p. 447. According to the statute, (s. 47), the prisoner shall be deemed guilty of the offence, "although the chattel, money, or valuable security was not received into the possession of such master, otherwise than by the actual possession of his clerk or servant, or other person so employed." But where the prosecutor gave marked money to a friend, with directions to buy some article with it at the prosecutor's shop ; and he accordingly bought the article from the prisoner, who was the prosecutor's shopman, with the marked money, which the prisoner received and embezzled : it was objected for the prisoner, that as the money had been in the possession

of the master, and might be considered as the master's at the time that the prisoner received it, the case did not come within the statute, but was a larceny at common law; but the judges held it to be a case within the statute, and that an indictment for larceny at common law would not lie for it. *R. v. Hedge, R. & Ry.* 160. Whether the case of a servant receiving money from the master, and embezzling it, be within the meaning of the Act, was a question submitted to the judges in *R. v. Elizabeth Smith, R. & Ry.* 267; but no opinion was delivered upon it, the case being decided upon another ground. In *Hedge's* case, above mentioned, the judges seemed to be of opinion that the statute did not apply to cases which amount to a larceny at common law. And therefore if a servant or clerk take money or goods, &c., out of his master's stock, he should be indicted for larceny, not embezzlement. And in a subsequent case, this was expressly decided by the judges: where the prisoner, who was clerk to the prosecutor, received from another of his clerks twenty shillings of the master's money to pay for an advertisement, and he paid only ten shillings, charged twenty shillings, and embezzled the other ten shillings: the judges held that he could not be convicted of embezzlement, as the money had been in the prosecutor's possession by the hands of his other clerk. *R. v. Murray, Ry. & M.* 276. But now, by stat. 14 & 15 Vict. c. 100, s. 13, "if, upon the trial of any person indicted for embezzlement as a clerk, servant, or person employed for the purpose or in the capacity of a clerk or servant, it shall be proved that he took the property in question in such a manner as to amount in law to larceny, he shall not by reason thereof be entitled to be acquitted, but the jury shall be at liberty to return as their verdict that such person is not guilty of embezzlement, but is guilty of simple larceny, or of larceny as a clerk, servant, or person employed for the purpose or in the capacity of a clerk or servant, as the case may be; and thereupon such person shall be liable to be punished in the same manner, as if he had been convicted upon an indictment for such larceny."

3. That he received the money, &c., for, or in the name of, or on account of his master. This the jury may infer from the circumstances of the case. Upon an indictment for embezzlement, it appeared that the prisoner worked for the prosecutors, who were turners; that it was part of his duty to receive orders for jobs, to take the materials from his master's stock and work them up, to deliver out the articles and receive the money for them, and to pay the whole of the money received to his masters; and every week he received for his labour, a certain proportion of the money received for the articles made by him: in his character of servant to the pro-

secutors, he received an order for six dozen of coffee-pot handles: he took the wood from his master's stock, he turned them on their premises and with their machinery; he delivered them, received the price, concealed the transaction, and kept the whole of the money, his own share of it for his labour being only about a third: the prisoner was convicted, but it being doubted whether this was not rather a larceny of the materials, than a case within the meaning of this Act, the matter was referred to the judges, and they unanimously held that the conviction was correct. *R. v. Hoggins, R. & Ry. 145.* But whether the money embezzled, was really due to the master or not, whether he could have recovered it, or had a right in law to receive it, is immaterial; if the clerk or servant received it for him, or in his name, or on his account, it is sufficient. *Resolved by the judges in Beacall's case, 1 Car. & P. 454.* And therefore where the prisoner, appointed by overseers of the poor to receive poor-rates, demanded the poor-rate for certain premises of the landlord instead of the tenant (the landlord being in the habit of paying his tenant's rates), and the landlord paid it: the prisoner being indicted for embezzling this sum, and convicted, the judges of the criminal appeal court held that although the overseers could not enforce payment of the sum from the landlord, yet as the defendant had received it on their account, it was within the statute, and the party rightly convicted. *R. v. Adey, 19 Law J. 149 m.*

4. That he received it by virtue of his employment as such clerk or servant. This depends upon the fact whether he was authorized by his master to receive money, &c., in such a case. Where the lessees of tolls of a turnpike gate, hired the prisoner to collect at a particular gate at weekly wages, and this was his sole employment; upon a particular occasion one of his masters desired him to receive from the collector at another gate the money collected by him, which he did and embezzled it: a majority of the judges held, that although the receipt of this money by the prisoner was out of his ordinary employment, yet as he was the servant to the lessees, and in his character of servant to them had submitted to be employed by them to receive the money in question, and had received it by virtue of being so employed, the case was within the statute. *R. v. Thomas Smith, R. & Ry. 516.* And in another case, where, upon an indictment for embezzling money of the prosecutors, who were carcase butchers, it appeared to be the duty of the prisoner every evening to receive from the porters the money they took in the course of the day for the meat sold, and to pay it over the next morning to the collecting clerk, but he was not expected in the course of his employment to receive money from the customers themselves; the prisoner

however called upon one of his master's customers for the amount of his account, received it, and embezzled it: the judges were of opinion that as the prisoner was entrusted to receive from the porters such monies as they collected from the customers in the course of the day, the receiving of it immediately from the customers, instead of receiving it through the medium of the porters, was such a receipt of money "by virtue of his employment" as the Act meant to protect. *R. v. Beechey, R. & Ry.* 390. Where by the course of business in the prosecutor's establishment, the customers paid their money to the clerks, the clerks paid it over to the superintendent, and he paid it to the prisoner, whose duty it was to keep an account of the sums so paid to him, and pay them over to the cashiers; they were all servants of the prosecutor; three of the sums which the prisoner had thus received, he embezzled, and being indicted for embezzlement, it was objected that as he had received them from one of his master's clerks, they were his master's money, and on the authority of Murray's case, *ante*, p. 452, it was not embezzlement, but larceny: but the judges of the criminal appeal court held that it was embezzlement; and they distinguished it from Murray's case, as the prisoner there received the money for a particular purpose and misapplied it, here the prisoner stopped these sums of money on their way to his master, and embezzled them. *R. v. Masters, 2 Car. & K.* 930. But where the clerk or servant receives money without authority, either direct or to be implied from the nature of his employment, his applying it to his own use will not be an offence within the Act. Therefore where it was proved to be the duty of the prisoner, a butcher's apprentice, to call daily on certain of his master's customers for orders, but it did not appear that he had ever been employed to receive money; and he received from one of the customers the amount of his bill, and embezzled it: being convicted, and his case being referred to the judges, they were of opinion that as it was not proved that the prisoner was ever employed to receive money for his master, and it did not therefore appear that he received the money in question by virtue of his employment, the conviction was wrong. *R. v. Mellish, R. & Ry.* 80. So, where a customer paid some money to a carrier's warehouse clerk, who was not authorized to receive it, that duty being entrusted to the collecting clerk only, and the warehouse clerk embezzled it, the judges held that he was not a clerk or servant, within the meaning of the Act. *R. v. Thorley, Ry. & M.* 343. Where the master of a charity school was sent by the treasurer, who was also one of the committee, for fifteen pounds, which the ironmongers' company had given to the charity, but it was not the duty of the schoolmaster to receive money on account of the charity, that being entrusted to the collector only: it was holden not only that this was not a receipt by

virtue of his employment, but that he was neither clerk nor servant to the treasurer or the committee. *R. v. Nettleton*, *Ry. & M.* 259.

5. That he embezzled the money, &c., received by him, or some part of it. The usual evidence given of the embezzlement is, that having received the money, &c., he denied the receipt of it,—or did not account to his master for it when he ought,—or accounted for other monies received by him at the same time or after, and not for it,—or rendered a false account,—or practised some other deceit in order to prevent detection: from which the jury may fairly infer that the defendant either actually disposed of the money, &c., to his own use, or withheld it from his master with intent to do so, and to defraud the master of it,—which seems to be the meaning of the word embezzle. The words in the repealed Act upon this subject were—“embezzle, secrete, or make away with;” the words “secrete or make away with” are omitted in this statute, as meaning, I presume, the same thing as the word “embezzle.” For it is clear that if a clerk render a true account, but claim to withhold the sum in question, alleging a right to do so, or merely fail to pay it over, this will not be embezzlement. Where the captain of a ship received freight for 215 tons of culm, and accounted with the owner of the ship, his master, for 210 tons only; in fact, the culm was weighed into the ship as 210 tons, and weighed out as 215, and the captain claimed the freight on the difference, as being entitled to it by a custom of the trade: *Cresswell, J.*, held that this was not embezzlement. *R. v. Norman*, 1 *Car. & K.* 501. So, where the prisoner charged himself in his master's books with money received by him, but did not pay it over to the master, *Vaughan, B.*, held this not to be embezzlement. *R. v. Hodgson*, 3 *Car. & P.* 422. So, where the prisoner was entrusted to receive several sums for water rate, and being asked by the collector whether he had received them, said that he had, and would pay them over on the following Monday, but instead of doing so he absconded: *Erskine, J.*, held, that as he had accounted, his not paying the money over was not embezzlement. *R. v. Creed*, 1 *Car. & K.* 63. But where it appeared that the prisoner, who was coachman of a stage coach, had to account for monies received by him from passengers, to the book-keeper at one stage, and had to pay over the monies to his master; and on one particular occasion he rendered an account of the true sums to the book-keeper, and they were entered in the books accordingly, but he paid to his master a less sum, as being all that he had received: *Patteson, J.*, held this to be embezzlement. *R. v. White*, 8 *Car. & P.* 742. But if a clerk or servant, entrusted to receive a sum of money, receive it, and abscond, without ac-

counting for it, this is clearly embezzlement. *R. v. Sarah Williams*, 7 *Car. & P.* 338. So, where a servant, authorized to receive money, and whose duty it was to account every evening for what he so received, received three sums for his employer on different days, and neither accounted for them nor paid them over, and it appeared that this must have been wilfully done: Coleridge, J., held, that if this were done wilfully, it was embezzlement, although the servant never denied the receipt of these sums, nor rendered any account in which they were omitted; *R. v. Jackson*, 1 *Car. & K.* 384; for here there was concealment and fraud, both essential ingredients in the offence of embezzlement. So, where a servant does not account for a particular sum received by him, but accounts for other sums received by him at the same time or afterwards,—this is strong evidence of embezzlement. *R. v. Hall*, *R. & Ry.* 463. But the mere omission to account for the receipt of a particular sum, particularly in a long account and of great extent, will not of itself amount to embezzlement, if not accompanied by other circumstances, such as a denial of the receipt of the money or the like, showing the omission to be wilful; for otherwise the omission might arise from mere carelessness. *R. v. Jones*, 7 *Car. & P.* 833. So, where it was proved that the prosecutor had given 5*l.* 8*s.* to the prisoner, his housekeeper, to pay to the overseer of the poor for poor-rates, and that the overseer never received that or any other sum from the prisoner: the judges held that this was not sufficient evidence of the prisoner's having embezzled the money; the fact of not having paid the money over to the collector, was not evidence of actual embezzlement, it only negatived the application of the money in the manner directed. *R. v. Elizabeth Smith*, *R. & Ry.* 267. But if a clerk or servant receive money for his master, and deny the receipt of it, this is clearly embezzlement. *R. v. Hobson*, *R. & Ry.* 56. *R. v. Taylor*, *R. & Ry.* 63. Where the prisoner, a brewer's drayman, was sent out with porter for the customers, and also with an extra quantity of bottled porter which he was authorized to sell at 9*s.* 6*d.* per dozen; he in fact sold a dozen for 6*s.*, but did not receive the price at that time; the brewer hearing of this, desired the purchaser to pay the prisoner when he should call for payment, and he did so, and the prisoner being questioned about this afterwards by his master, denied it: Patteson, J., after conferring with Parke, B., held this to be embezzlement. *R. v. Aston*, 2 *Car. & K.* 413. It was objected in this last case, that as the prisoner had sold under the price limited, it could not be said that he received the 6*s.* by virtue of his employment; but it was holden that the master, by calling on the purchaser, and desiring him to pay the sum agreed upon, he was bound by the payment and could not demand more, and so confirmed the sale made by

the prisoner. *Id.* So, the rendering of false accounts, by means of which a clerk or servant retains for himself a portion of the property which he should have handed over to his master, is in general deemed pregnant proof of embezzlement. In one case, indeed, where it appeared that the prisoner was clerk and traveller to the prosecutor, and his duty was to receive the money from the customers, to pay the wages and other outgoings out of it, and to enter these payments first in a small book, and to carry their weekly total into a larger book, which contained the general debtor and creditor account between the prisoner and his master, and the balance being struck from time to time, was either paid by the prisoner, or carried forward; in the instance from which the prosecution arose, the week's amount of outgoings, which in the small book amounted to 25*l.*, was carried into the larger book as 35*l.*, and this appeared to be written on an erasure; in the month following the account, comprising this entry, was settled, and the balance carried over, and in two months afterwards, the account was again balanced, and the balance paid by the prisoner to the prosecutor: Williams, J., asked if it could be shown that the whole or any part of any precise sum received by the prisoner for his master had been embezzled by him, and being answered in the negative, said that in the absence of such evidence the prosecution could not be sustained. *R. v. Chapman*, 1 *Car. & K.* 119. But in many cases such evidence, from the very nature of the clerk's employment, as for instance that of cashier in a banking house, or the like, cannot be given. Where a banker's cashier was indicted for embezzlement, and it appeared that it was his duty to put all sums received by him into a box or till, of which he kept the key, and to enter them in the money book; at the end of each day he balanced the book, and the balance formed the first item in his account on the following day; the master having a suspicion of him, examined his money book, according to which there ought then to be 1,300*l.* in the till and box, but on examination they in fact contained but a sum of 345*l.*, he having applied the rest to his own use, but when, or in what sums, or from whom the particular monies embezzled were received, did not appear: the judges at the central criminal court held this to be within the statute, and the prisoner was convicted; *R. v. Grove*, 7 *Car. & P.* 635; and the case being afterwards considered by the judges, eight of them held the conviction to be right, and seven were of a contrary opinion. *Id.* *Ry. & M.* 447. But where in a subsequent case, the only evidence which could be given was that of a general deficiency in the prisoner's account, Alderson, B., held it not to be sufficient; and said that the difference in opinion in Grove's case arose more from the peculiar facts of that case, than from any doubt upon the law. *R. v. Lloyd Jones*,

8 Car. & P. 288. Where however the prisoner, a clerk to the prosecutors, received on their account a sum of 18*l.* in one pound notes, and entered in their books the sum of 12*l.* only; he also received on the same day, the sum of 104*l.* 2*s.*, and entered that correctly; and in the evening he accounted with the prosecutors for 116*l.* 2*s.* only: being indicted for embezzling 6*l.*, the difference between the 18*l.* received and the 12*l.* accounted for, it was objected on his behalf that the 116*l.* paid by him to the prosecutors, might have included every one of the notes of which the 18*l.* consisted, and if so, he could not be considered as having embezzled any of those notes: he was convicted, and the point reserved for the opinion of the judges, a great majority of whom held the conviction to be right, and that he was guilty of an embezzlement from the time of his making the false entry. *R. v. Hall, R. & Ry.* 463. The difficulty suggested, in this case, of proving an embezzlement of the identical notes or coin received and embezzled by the offender, has been remedied by stat. 7 & 8 G. 4, c. 29, s. 48, and 14 & 15 Vict. c. 100, s. 18, as already mentioned, *ante*, p. 447.

We have seen (*ante*, p. 445,) that where a clerk or servant takes money or goods from his master's stock, and appropriates them to his own use,—if the property taken be in the possession of the master but one instant,—the servant or clerk is guilty of larceny, not embezzlement. If the clerk of a banker, or the shopman of a draper, receive money from a customer, and instead of putting it into the till or drawer, put it into his pocket, and appropriate it,—he is guilty of embezzlement; but if when he receives it, he put it into the till or drawer, and then take it out and appropriate it, he is guilty of larceny. A mistake however in this respect, in framing the indictment for embezzlement, where upon evidence the offence turns out to be larceny, is not now material; by stat. 14 & 15 Vict. c. 100, s. 13, “if upon the trial of any person indicted for embezzlement as a clerk, servant, or person employed for the purpose or in the capacity of a clerk or servant, it shall be proved that he took the property in question in any such manner as to amount in law to larceny, he shall not by reason thereof be entitled to be acquitted, but the jury shall be at liberty to return as their verdict that such person is not guilty of embezzlement, but is guilty of simple larceny, or of larceny as a clerk, servant, or person employed for the purpose or in the capacity of a clerk or servant, as the case may be, and thereupon such person shall be liable to be punished in the same manner as if he had been convicted upon an indictment for such larceny.”

*Bankers or Agents Selling or Converting Goods or Valuable Securities entrusted to them for safe keeping, or for a Special Purpose.**Indictment.*

— } The jurors for our Lady the Queen, upon their
to wit. } oath present, that before and at the time of the
committing of the offence hereinafter mentioned, to wit, on the
— day of —, in the year of our Lord —, A. B. was
banker and agent to C. D., [*“banker, merchant, broker, attorney,
or other agent”*] and that whilst the said A. B. was such
banker and agent to the said C. D. as aforesaid, to wit,
on the day and year aforesaid, the said C. D. did entrust to the
said A. B., as such banker and agent aforesaid for safe custody
[*or for a certain special purpose, to wit, for the purpose of*
—] a certain exchequer bill [*“any chattel or valuable
security, or any power of attorney for the sale or transfer of
any share or interest in any public stock or fund, whether of
this kingdom, or of Great Britain or of Ireland, or of any
foreign state, or in any fund of any body corporate, company,
or society”*] without any authority to sell, negotiate, transfer,
or pledge the same; and which said exchequer bill the said
A. B., so being such banker and agent as aforesaid, well know-
ing the premises, did then as such banker and agent as afore-
said, receive and take into his possession for safe custody as
aforesaid [*or for the purpose aforesaid*], from the said C. D.,
and that the said A. B., afterwards, and whilst he was such
banker and agent to the said C. D., as aforesaid, to wit, on the
day and year aforesaid, in violation of good faith, and contrary
to the object and purpose for which the said exchequer bill
was so entrusted to him as aforesaid, unlawfully did sell,
negotiate, transfer, and convert to his own use and benefit
[*“sell, negotiate, transfer, pledge, or in any manner convert
to his own use or benefit”*] the said exchequer bill [*“such
chattel or security, or the proceeds of the same, or the share or
interest in the stock or fund to which such power of attorney
shall relate, or any part thereof”*]: against the form of the
statute in such case made and provided, and against the peace
of our Lady the Queen, her crown and dignity. [*The exche-
quer bill or other instrument may be described by the name
or designation by which the same is usually known. 14 & 15
Vic. c. 100, s. 7, ante, p. 90. Where it is confided to the
agent for a special purpose, the purpose must be set out,
and correctly. R. v. White, 4 Car. & P. 46.*

*Misdemeanor; transportation for not more than fourteen
years, nor less than seven;—or such other punishment by
fine or imprisonment or both, as the court shall award,*

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7 & 8 G. 4, c. 29, s. 49, such imprisonment to be with or without hard labour, and solitary for the whole or any part of the time. *Id.* s. 4. This section of the statute also defines another offence, namely, bankers, &c., converting to their own use, money or security for money entrusted to them, with a direction in writing to apply it to a particular purpose.

Evidence.

To maintain this indictment, the prosecutor must prove—

1. That he entrusted the exchequer bill, &c., as described in the indictment, to A. B., for safe custody, or for the special purpose mentioned in the indictment; and that A. B. was at the time his banker or agent, &c. It must appear also that it was entrusted to him, in the ordinary exercise of his particular functions or business. *R. v. Prince, Moody & M.* 21, 2 Car. & P. 517.

2. That no authority was given to A. B. to sell or negotiate the exchequer bill, for his own use.

3. That the defendant sold or negotiated it, or converted it to his own use, as stated in the indictment.

It is provided however by 7 & 8 G. 4, c. 29, s. 50, that the 49th section shall not affect any trustees or mortgagees for any act done by them in respect of the property comprised in the trust or mortgage; nor restrain any banker, &c., from receiving money due and payable on any valuable security, or from selling securities or effects on which he has a lien.

Also, by sect. 52, no banker, &c., shall be liable to be convicted as an offender against this Act, if he shall have previously disclosed the offence on oath, in consequence of any compulsory process of any court of law or equity, in any action, suit, or proceeding, *bond fide* instituted by a party aggrieved, or if he shall have disclosed the same in any examination or deposition before any commissioner of bankrupt.

Factor Pledging the Goods of his Principal.

Indictment.

—) The jurors for our Lady the Queen, upon their oath to wit.) present, that A. B., on the — day of —, in the year of our Lord —, being then a factor and agent [“*any agent*”], was entrusted as such factor and agent by C. D., with the possession of one thousand quarters of wheat [“*with the possession of goods, or of the documents of title to goods*”]

of the goods and chattels of the said C. D.; and the said A. B., well knowing the premises, afterwards, to wit, on the day and year aforesaid, without any authority from the said C. D., his principal, in that behalf, did, for his own benefit and in violation of good faith, deposit the same [*“make any consignment, deposit, transfer, or delivery”*] with E. F., by way of pledge, lien, and security, [*or did accept an advance of certain money on the faith of an agreement to transfer or deliver the same to E. F.*]: against the form of the statute in such case made and provided, and against the peace of our Lady the Queen, her crown and dignity.

Misdemeanor; transportation for not more than fourteen years, nor less than seven; or other punishment by fine or imprisonment or both, as the court shall award. 5 & 6 Vict. c. 39, s. 6: And every clerk, or other person knowingly and wilfully assisting in doing so,—the same punishment. Id.

See also stat. 7 & 8 G. 4, c. 29, s. 51, on the same subject.

Evidence.

To maintain this indictment the prosecutor must prove—

1. That he entrusted A. B., who was then an agent, with the possession of the goods mentioned in the indictment, or with a bill of lading or other document of title to them, if such be mentioned.

2. That the defendant afterwards deposited the goods, &c., with E. F., as a pledge or security for money. It is provided however by the statute, that no such agent shall be liable to any prosecution, for consigning, depositing, transferring, or delivering any such goods or documents of title, in case the same shall not be made a security for, or subject to the payment of, any greater sum of money than the amount which may be due to him from his principal, together with the amount of any bills of exchange drawn upon him by his principal, and accepted by him. 5 & 6 Vict. c. 39, s. 6.

3. That he the prosecutor gave the defendant no authority to pledge the property or dispose of it in any way to his own use, in the manner mentioned.

It is provided by the statute, that such agent shall not be convicted by reason of any act done by him, if he shall have disclosed the same on oath, in consequence of any compulsory process of any court of law or equity in any action, suit, or proceeding *bond fide* instituted by a party aggrieved, or if he

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shall have disclosed the same in any examination or deposition before any commissioner of bankrupt. 5 & 6 Vict. c. 39, s. 6.

Embezzlement by Officers in the Queen's Service.

Indictment.

— } The jurors for our Lady the Queen, upon their
to wit. } oath present, that A. B., on the — day of —,
in the year of our Lord —, being then a person employed in
the public service of Her Majesty, to wit, as —, and being
then by virtue of such his employment, entrusted with the
receipt, custody, management, and control of money [*“chattel,
money, or valuable security”*] of Her Majesty the Queen,
feloniously did embezzle certain money of her said Majesty the
Queen, being parcel of the money of which he then had the
custody, management, and control, by virtue of his said em-
ployment, as aforesaid, and did then fraudulently and felo-
niously apply and dispose of the same to his own use and
benefit [*“shall embezzle the same or any part thereof, or in
any manner fraudulently apply or dispose of the same or
any part thereof to his own use or benefit”*]: against the form
of the statute in such case made and provided, and against
the peace of our Lady the Queen, her crown and dignity.
[Three acts of embezzlement may be included in the same in-
dictment; 2 W. 4, c. 4, s. 8; in the same manner as ante,
p. 446. The words “valuable security,” are defined by the
Act (s. 2) in the same words as in stat. 7 & 8 G. 4, c. 29, s. 5,
ante, pp. 391, 392. But where the embezzlement is of
money or valuable security, it is “sufficient to allege the
embezzlement or fraudulent application or disposition to be
of money, without specifying any particular coin or valuable
security.” 2 W. 4, c. 4, s. 3. The property must be laid in
“the Queen's Majesty.” See *Id.* s. 4. The venue may be
laid either in the county in which the offender is appre-
hended, or in that in which the offence was committed.
Id. s. 5.]

*Felony; transportation for not more than fourteen years,
or less than seven;—or imprisonment with or without hard
labour for not more than three years. 2 W. 4, c. 4, s. 1.*

Evidence.

To maintain this indictment, it is necessary to prove—

1. That the defendant exercised the office mentioned in the indictment. It is not necessary to prove his appointment. *Ante*, p. 135.

2. That by virtue of his office or employment, he was entrusted with the receipt, custody, management, or control of the money, chattel, or valuable security which he embezzled. If it be proved that he was usually so entrusted, it will be presumed that it was by virtue of his employment. *R. v. Townsend, Car. & M.* 178. Under the term "money" in the indictment, you may give in evidence any species of coin, bank-notes, or any of the securities for money mentioned *ante*, pp. 391, 392. See 2 *W.* 4, c. 4, s. 2. But if the embezzlement be a chattel, it must be named in the indictment, in the same manner as in larceny, and proved as laid.

3. The embezzlement. See *ante*, p. 455.

11. *Cheating or Defrauding.*

Obtaining Money by false Pretences.

Indictment.

— } The jurors for our Lady the Queen upon their
to wit. } oath present, that A. B., on the — day of —,
in the year of our Lord —, unlawfully and knowingly did
falsely pretend to C. D., that [he the said A. B. was sent to
him the said C. D. by E. F., one of his neighbours, to request
the loan of five pounds, and that he the said E. F. would repay
the same to him the said C. D. on the next following day,—
or as the pretence may be]: by which said false pretences the
said A. B. then unlawfully did obtain from the said C. D.
certain money of him the said C. D. [*"chattel, money, or
valuable security."* If a chattel, state it as in larceny—of
the goods and chattels of the said C. D.,] with intent to de-
fraud: whereas in truth and in fact [the said A. B. was not
sent to him the said C. D. by the said E. F. to request the
loan of five pounds, or any other sum of money]; and
whereas in truth and in fact [the said E. F. did not say, or
send the said A. B. to the said C. D. to say, or desire him to
say, that he would repay the same to him the said C. D. on the
next following day]—as he the said A. B. did then so falsely
pretend to the said C. D.; and the said A. B., at the time
he so falsely pretended as aforesaid, well knew the said pre-
tences to be false: against the form of the statute in such case
made and provided, and against the peace of our Lady the
Queen, her crown and dignity. [*As to the venue*, see *ante*,
p. 70. *Several persons may be indicted jointly for the
offence; and where goods were obtained by false pretences,*

False Pretences.

ing by words spoken by one of the parties to the others, but all of them were acting in holden that they might be jointly indicted.

al., 3 T. R. 98. The indictment must specify false pretences, R. v. Munoz, 2 Str. 1127. R. v. Mason, 3 T. R. 531, as in the above form; but if the pretence be in writing, it is not necessary to set it out in hæc verba, unless some question turn upon the form of the instrument; it is sufficient to state the pretence in substance, as it appears in the writing. R. v. Coulson et al., 19 Law J. 182 m. It has been usual to state in the indictment that the defendant "unlawfully" did falsely pretend; but the word "unlawfully" is not necessary, not being required by the statute, which defines the offence thus,—"if any person shall by any false pretence obtain any chattel, money, or valuable security, with intent to cheat or defraud." It has been holden to be necessary to state that the defendant did "knowingly" by false pretences, &c.; R. v. Henderson et al., Car. & M. 328. R. v. Philpotts, 1 Car. & K. 112; but the authority of these cases perhaps may be doubted; a former statute upon the subject, 30 G. 2, c. 24, s. 1, did require it, the words being, "that all persons who knowingly and designedly by false pretences," &c., but this statute is not so; and it has lately been decided that the omission of the word "unlawfully," is no objection after verdict, although the evidence ought to be such as to imply that the defendant knew the pretence to be false. R. v. Bowen, 19 Law J. 65 m.

If money, or notes of the Bank of England or any other bank have been obtained, it is sufficient to describe them by the word "money." 13 & 14 Vict. c. 100, s. 18, ante, p. 90. If it be a written instrument of any kind which has been obtained, it is sufficient to describe it by the name or designation by which it is usually known. Id. s. 5, ante, pp. 89, 90. But the thing obtained must be stated to be the property of some person, as in larceny. R. v. Norton, 8 Car. & P. 196.

As to the intent, it is sufficient now to state it to be "to defraud," without stating the intent to be to defraud any particular person. 14 & 15 Vict. c. 100, s. 8, ante, p. 87.

The indictment must negative the pretences by special averment, R. v. Perrot, 2 M. & S. 379, as in the above precedent.

Misdemeanor; transportation for seven years;—or such other punishment by fine or imprisonment, or both, as the court shall award, 7 & 8 G. 4, c. 29, s. 53, the imprisonment to be with or without hard labour, and solitary for the whole or any portion of the time. Id. s. 4.

Evidence.

To maintain this indictment, the prosecutor must prove—

1. The pretence. Before I state the cases which have been decided upon this subject, it may be convenient here to notice a few general principles, which have been laid down and well established, upon it :

First, the pretence must consist of a statement of some pretended existing fact, made for the purpose of inducing the prosecutor to part with his property ; no statement of any thing to take place in future, will be a pretence within the Act. Where a man induced a butcher to send him meat, upon pretence that he would pay for it on delivery : the judges held that this was not a pretence within the Act, it was merely a promise for future conduct. *R. v. Goodall, R. & Ry.* 461. But where four persons were indicted for falsely pretending that one of them had made a bet with a colonel at Bath, of five hundred guineas, that another of them would run ten miles within the hour, and thereby obtained twenty guineas from the prosecutor as part of the pretended stakes ; and, upon a writ of error, it was objected that as the pretended bet related to a future event, it was not within the Act : but the court held that the alleged bet, and not the race, was the pretence : it was also objected that the indictment was not sufficiently certain, in merely stating “ a colonel at Bath,” without naming him ; but the court held it sufficient, for probably he was not named by the defendants : and it was lastly objected that the person alone who uttered the false pretences could be convicted, and that the others ought to have been acquitted ; but the court held that as all were present and acting in the deceit, they were all equally guilty. *Young et al. v. Rex in error*, 3 T. R. 98.

Secondly, it is not necessary that the pretence should be in words ; there may be a sufficient false pretence within the meaning of the Act, to be implied from the acts and conduct of the party, without any verbal representation of a false or fraudulent nature. Where a man at Oxford, not a member of the university, went to a tradesman's shop, wearing a commoner's cap and gown, and ordered goods, part of which he obtained at the time : this was holden by Bolland, B., to be good evidence to sustain an indictment, alleging that he falsely pretended that he was an undergraduate of the University of Oxford. *R. v. Barnard*, 7 Car. & P. 784. So, where the prisoner in payment for some small articles, tendered in payment a forged promissory note for ten shillings and sixpence and received the change ; and being indicted as for obtaining the goods and money by false pretences, (notes under twenty

shillings being declared void by statute, and not being the subject of a prosecution for forgery), it was objected that here there was no representation made by the prisoner, no false suggestion of a fact, the fraud being in the fabrication of the instrument, and not in the representation of the prisoner: but the judge being of opinion, that the uttering of the note as a genuine instrument, was tantamount to a representation that it was so, the prisoner was convicted; and a majority of the judges afterwards held the conviction to be right. *R. v. Freeth, R. & Ry.* 127. But where the forged instrument may be made the subject of a prosecution for forgery, the party should not be indicted for false pretences; and where a man obtained goods by a forged request note, in this form, "Mr. Brooks, please to let the bearer, Wm. Turton, have for J. Roe, four yards of Irish linen and a waistcoat, John Roe," and was indicted as for obtaining the goods by false pretences, Taunton, J., held that he could not be convicted, for it was a felony. *R. v. Evans, 5 Car. & P.* 553. But now if upon an indictment for a misdemeanor the evidence prove a felony, the defendant shall not on that account be acquitted, unless the court think proper to discharge the jury, and order him to be prosecuted for the felony. 14 & 15 *Vict. c.* 100, s. 12, *ante*, p. 124. Where a man of the name of Story, presented a post-office order payable to one Storer, to the postmaster for payment, and being desired to write his name upon it, wrote his real name and was paid: being indicted for obtaining the money by a false pretence, it was objected that as the prisoner had merely presented the order for payment, without making any untrue declaration or assertion, it was not a case within the meaning of the statute; but the judges held that by presenting the order for payment, and signing his name at the post-office, he had represented himself to the postmaster as the person named in the order, and that such representation was clearly a pretence within the meaning of the Act. *R. v. Story, R. & Ky.* 81. Where a man passed a note of a country bank, which he knew had stopped payment, and was indicted for obtaining goods under false pretences; but it appearing that one of the partners was solvent, Gaselee, J., held that the prisoner could not be convicted. *R. v. Spencer, 3 Car. & P.* 420. Where a man paid his addresses to a woman and obtained from her a promise of marriage, and afterwards upon her refusing to marry him, he threatened to bring an action against her, and thereby obtained money from her; but it turned out afterwards that he was already married, and therefore could not have maintained such an action: this was holden to amount to an implied pretence that he was unmarried, and he was convicted of obtaining the money by that false pretence. *R. v. Copeland, Car. & M.* 516. If a man in the purchase of goods, give his own cheque in payment, and it be

drawn on a banker with whom he never had an account: this is a false pretence, for it is impliedly a pretence that he has an account at that banker's. *R. v. Parker*, 7 Car. & P. 825.

Thirdly, in order to convict a man of obtaining money or goods, &c., by false pretences, it must be proved that they were obtained under such circumstances that the prosecutor meant to part with his right of property in the thing obtained and not merely with the possession of it; if the prosecutor part with the possession only, and not the right of property, we have seen (*ante*, p. 372) that the offence is larceny, and not an obtaining of property by false pretences. The reader will find a number of cases, illustrating this distinction, collected under the title "Larceny," *ante*, p. 372—379. However, a mistake in this respect, is not now of so much importance as formerly; for by stat. 7 & 8 G. 4, c. 29, s. 53, if upon an indictment against a person for obtaining goods, &c., by false pretences, "it shall be proved that he obtained the property in question in any such manner as to amount in law to larceny, he shall not by reason thereof be entitled to be acquitted of such misdemeanor." And therefore in cases of doubt, whether the right of property or only the possession passed, it is always advisable to indict for obtaining the property by false pretences, instead of for larceny. See *ante*, p. 379.

Having noticed these general principles, I shall now proceed to notice the decisions as to what amounts to a pretence within the meaning of the statute. And first, as to cases where the offender, by making a false representation of himself, induces the prosecutor to part with his property:—Where the prisoner, by falsely pretending that he was Mr. Hitchings, who cured Mrs. Clark at the Oxford Infirmary, obtained from a person five shillings for a bottle of eye-water: this was holden to be a false pretence within the Act. *R. v. Bloomfield*, Car. & M. 537. Secondly, where goods, &c., are thus obtained, by using a third party's name, without any authority from him to do so: as for instance, if a man, by falsely pretending that he was sent to the prosecutor for goods by one of his customers, or for the amount of a debt by one to whom he owed it, or for a loan of money by one of the prosecutor's friends, or the like, obtain the goods or money,—such a case would come within the statute. Where the prisoner went to a tradesman's shop, and falsely said that her mistress, Mrs. Cook, a neighbour, would be obliged to him to let her have half a guinea's worth of silver, and that she would send the half-guinea presently: the prisoner obtained the money, and being indicted as for larceny, it was holden not to be larceny, but an obtaining of the money under false pretences. *Celman's case*, 2 East, P. C. 672. 1 Leach, 339, *ante*, p. 377. And lastly, where a man is induced to part with his

property, by a false statement of any other alleged existing fact :—Where a man, who was a member of a benefit society, falsely represented to the clerk of the society, in the presence of C. D., one of the stewards, that his wife was dead, and thereby obtained from the steward five pound out of the society's box : this was holden to be a false pretence within the statute, and being made in C. D.'s presence, it might be alleged to be made to him, and the money to be the property of C. D. and others. *R. v. Dent*, 1 *Car. & K.* 249. Where the prisoner, in selling cheeses to the prosecutor, pretended to take a sample, or taster as it is termed, from the cheese by a scoop, and the prosecutor approving of it purchased the cheese; in fact the taster had not been taken from that cheese, but was previously at the end of the scoop, and had been taken from a cheese of a much superior quality: the defendant was convicted, and the judges held the conviction to be right. *R. v. Abbott*, 2 *Car. & K.* 630. *S. P. R. v. Dark*, *R. v. Garlick*, *Id.* 632. Where a carrier employed by C. D. to carry goods from K. and to deliver them to one Leach, at L., afterwards, by falsely pretending to C. D. that he had carried and delivered them, obtained from him sixteen shillings for the carriage : being indicted for obtaining this money by false pretences, and convicted, the judgment was affirmed on error. *R. v. Airey*, 2 *East*, 30. Where a porter, who had to deliver a parcel to the Countess of Ilchester, was authorized by his ticket to receive six shillings and sixpence for carriage and portage, but changed the figures into nine shillings and ten pence, and demanded that sum from the countess's servant, who paid him, and was allowed the payment in account by his mistress: the prisoner being indicted for this, as obtaining three shillings and four pence under false pretences, it was objected that there was another statute, by which such an offence in a porter was punishable by penalty upon summary conviction ; but *Ld. Ellenborough*, C. J., held that statute to be cumulative merely, and that it did not take away the previous remedy by indictment : it was then objected that the money at the time it was obtained, was the money of the servant, not of the countess ; but it appearing that the servant had at the time more than that amount of the countess's money in his possession, *Ld. Ellenborough* held that to be sufficient. *R. v. Douglas*, 1 *Camp.* 212. Where the secretary of a society of odd-fellows told the prosecutor, who was a member, that he owed the society thirteen shillings and nine pence, and he produced and served a paper purporting to be a summons, signed by himself, giving him notice to that effect, and the prosecutor paid him ; but there was in fact only two shillings and two pence then due : he was convicted for obtaining the surplus by a false pretence, and the court of criminal appeal held the conviction to be right, *Ld. Campbell* saying that even if a tradesman

demanded of a customer five pounds as due to him, and obtained it, where in fact nothing was due to him, he might be indicted for obtaining it by false pretences. *R. v. Woolley*, 19 *Law J.* 165 *m.* Where the defendant, an attorney, having attended for the prosecutor before the magistrates on an information, when he was fined two pounds, came afterwards to the prosecutor's wife, falsely stated to her that he had been to the magistrates from another person who had been similarly fined, and he got the fine reduced to one pound, and if she would give him a sovereign he would get the same done for her husband; but this turned out to be a falsehood, and no application being made by the defendant, the prosecutor was obliged to pay the full penalty: this was holden clearly to be a false pretence within the Act. *R. v. Asterley*, 7 *Car. & P.* 191. Where the prisoner, by a false statement in a begging letter, obtained a sum of money from a gentleman as a charitable gift, it was holden by the criminal appeal court to be an obtaining of money by false pretences within the Act. *R. v. Jones*, 19 *Law J.* 162 *m.* So, a false pretence by the prisoners that one of them had made a bet of five hundred guineas with a person, whereby they obtained from the prosecutor twenty guineas as a contribution towards the stakes, was in the case of Young and others, *ante*, p. 465, holden to be a false pretence within the Act. Where the prisoner falsely pretended to the prosecutor that he was entrusted by the Duke of Lauzun to bring horses from Ireland, but being delayed by contrary winds, his money was all spent; and the prosecutor was thereby induced to advance him a sum of money: this was holden to be a false pretence within a former statute upon the subject. *Villeneuve's case*, *cit.* 8 *T. R.* 104, 105. So, where the prisoner falsely pretended to the prosecutor that he had obtained from Lord Stanley the appointment of emigration agent at Port Phillip, and offered for 200*l.* to give him a third of it, and the prosecutor was accordingly induced to give him the 200*l.*: a deed was then drawn up by the defendant's directions as for a partnership generally, without mention of the agency: being indicted for this, as for obtaining money by false pretences, it was objected for the prisoner that as the prosecutor had put in the deed as evidence, the parol evidence should be rejected, and the defendant acquitted: but the case went to the jury, who found the prisoner guilty; and the objection being reserved for the opinion of the judges, they held the conviction right. *R. v. Adamson*, 1 *Car. & K.* 192. So, where the prisoner was the acceptor of a bill for 2,638*l.* drawn by the prosecutor for value, and upon its becoming due, the prisoner falsely pretended to the prosecutor that he had the amount except 300*l.*, and thereby induced the prosecutor to advance him the 300*l.*: Patteson, J., held that if the prisoner did this for the purpose of getting the 300*l.*

and applying it to his own use, and not to the payment of the bill, it was a false pretence within the meaning of the Act; and the prisoner was convicted. *R. v. Crossley*, 2 *Ms. & R.* 17. But where the prisoner sold to the prosecutor a reversionary interest he had in some money left by his grandfather, and the prosecutor took a regular assignment of it, with the usual covenant for title; and it appeared that he had previously sold the same interest to another: being indicted for this, as for obtaining money by false pretences, *Littledale, J.*, held that he could not be convicted, and that the prosecutor's only remedy was by civil action on the covenant; if this were an offence within the Act, every breach of warranty, or false assertion at the time of making a bargain, might be treated as such, and the party be transported. *R. v. Codrington*, 1 *Car. & P.* 661. Nor can a man be indicted for obtaining money by false pretences, by selling a horse with a false warranty of soundness, however fraudulent the case may be. *R. v. Pywell*, 1 *Stark. N. P. C.* 402.

Care must be taken that there be no material variance between the pretence stated and that proved; if there be any doubt upon the subject, the offence should be stated differently in different counts, to correspond with the proof. Where the false pretence stated was a paper, which according to the indictment purported to be an order for the payment of 100*l.*, and the order when produced appeared not to be directed to any person: the judges held that as the paper did not purport to be an order for the payment of money, as stated in the indictment, the prisoner ought not to be convicted. *R. v. Cartwright*, *R. & Ry.* 106. So in all other cases, a variance in any material part between the statement of the pretence and the proof, will be fatal, unless in cases where the indictment may be amended as mentioned, *ante*, p. 100. It is not necessary however that the whole of the pretence should be proved; proof of part of the pretence, and that the money, &c., was obtained by such part, is sufficient. *R. v. Hill*, *R. & Ry.* 190. So, if the part in which the variance occurs may be rejected as surplusage, the variance shall not hurt: as for instance, where an indictment for an attempt to obtain money by false pretences, alleged the pretence to have been made to J. B. and others, with intent to defraud the said J. B. and others, and the evidence was that the false pretence was made to J. B. alone, although the intent was to defraud J. B. and his partners: the defendant being convicted, and the point being reserved for the opinion of the criminal appeal court, the judges there held that in the statement of the pretence as being made to J. B. and others, the words "and others" might be rejected as surplusage. *R. v. Kealey*, 20 *Law J.* 57 *m.* If the false pretence be in writing, and the writing be lost before the trial, the prosecutor will be allowed to give secondary evidence of it. *R. v. Chadwick*, 6 *Car. & P.* 181.

2. That the prisoner obtained the money, &c., by means of the false pretence. Where the prisoner, by lodging with his banker in the country a bill drawn upon a person in London, which he represented as good and would be accepted (but which in fact never was accepted afterwards), was allowed by his banker to draw cheques in favour of other persons, but he never in fact received any money himself upon the bill so lodged by him: the judges held that this was not an offence within the meaning of the statute. *R. v. Wavell*, *Ry. & M.* 224. And it must appear, by evidence, that the prosecutor parted with his property, by reason of the false pretence alleged, *R. v. Dale*, 7 *Car. & P.* 352, and of that alone. *R. v. Wickham*, 10 *Ad. & El.* 34. And, as has been already mentioned (*ante*, p. 467), it must appear that he parted with the right of property in the thing obtained, not merely with the possession. See *R. v. Barnes*, 20 *Law J.* 34 *m.* The thing obtained may be "any chattel, money, or valuable security." 7 & 8 *G. 4*, c. 29, s. 53. And a railway ticket has been holden to be a chattel, within the Act. *R. v. Boulton*, 2 *Car. & K.* 917. If the indictment state an obtaining of "money," "the allegation, so far as regards the description of the property, shall be sustained by proof of any amount of coin or of any bank-note, although the particular species of coin of which such amount was composed, or the particular nature of the bank-note, shall not be proved,"—"and by proof that the offender obtained any piece of coin or any bank-note, or any portion of the value thereof, although such piece of coin or bank-note may have been delivered to him in order that some part of the value thereof should be returned to the party delivering the same or to any person, and such part shall have been returned accordingly." 14 & 15 *Vict. c.* 100, s. 18, *ante*, p. 90. If a valuable security have been obtained, and it were such as by law to require a stamp,—as a bill of exchange or promissory note,—or a cheque not drawn payable to order or bearer, *R. v. Yates*, *Ry. & M.* 170, or issued at a greater distance than fifteen miles from the bankers, see *R. v. Perry*, 1 *Car. & K.* 725, *ante*, p. 393,—it must appear to have been stamped, for otherwise it would not be a valuable security within the meaning of the Act. If the prosecutor should fail in proving that the defendant obtained the money by the false pretence, the defendant may still be convicted of an attempt to commit the offence. 14 & 15 *Vict. c.* 100, s. 9, *ante*, p. 124.

3. The intent to defraud. This is a most essential part of the offence, and must be proved, *R. v. Williams*, 7 *Car. & P.* 354, if it do not appear sufficiently from the other facts of the case. Formerly it was necessary to state in the indictment that the offence was committed with intent to defraud some particular person. This was in some cases difficult, as the false pretence might be made to one person, and the property

472 *Attempt to obtain Goods by False Pretences.*

belong to another. But now by stat. 14 & 15 Vict. c. 100, s. 8, it is sufficient to allege that the money was obtained "with intent to defraud," without alleging an intent to defraud any particular person; and the evidence may be accordingly. Where the prisoner, a parish pauper, being urged by the overseer to go to work, excused himself by saying that he had no shoes, and the overseer therefore gave him a pair; it appeared however clearly to have been a false pretence, for he had at the time two pair of shoes which he had obtained of the parish: but because the pretence was evidently an excuse for not working, and not with intent to defraud the overseers of the shoes, the judges held it not to be an offence within the Act.

R. v. Wakeling, R. & Ry. 504 Where a foreman returned an account of the wages of the workmen to his master, as amounting to a particular sum, and obtained a cheque from his master, for that amount, for which he got cash, and paid the workmen; in fact the wages amounted to seven shillings less than the account returned by the foreman, which sum the foreman applied to his own use: being indicted for obtaining the cheques by false pretences, with intent to defraud his master "of the same," it was objected that the intent proved was, not to defraud the master of the cheque, but merely of a small portion of the produce of it; but the judges held that the indictment was supported by the evidence. *R. v. Leonard*, 2 Car. & K. 514. See also *R. v. Witchell*, 2 East, P. C. 830.

4. That the pretence was false. And it must appear either from the facts of the case, or from other facts proved from which the jury may imply it, that the pretence was false to the knowledge of the prisoner. *R. v. Henderson et al.*, Car. & M. 328. *R. v. Philpotts*, 1 Car. & K. 112. *Per* *Ld. Denman, C. J.* in *R. v. Bowen*, 19 Law J. 65 m.

Verdict, &c.] Upon an indictment for obtaining goods, &c., by false pretences, the jury may find the prisoner guilty, although the offence upon the evidence turn out to be larceny. 7 & 8 G. 4, c. 29, s. 53, *ante*, p. 174.

As to costs, *see ante*, p. 187. As to the restitution of property, at the trial, *see ante*, p. 192.

Attempt to obtain Goods, &c., by false Pretences.

This is a misdemeanor at common law. The indictment may be in the same form as for obtaining money under false pretences (*see ante*, p. 463), except, that instead of saying, "by means of which said false pretence the said A. B. then unlawfully did obtain," &c., you say, "by means of which said false pretence the said A. B. did then unlawfully attempt and endeavour to obtain," &c. See *R. v. Marsh*, 19 Law J. 12 m.

The evidence is also the same with the like exception. Where a man went into a pawnbroker's shop, and laid down eleven thimbles on the counter, saying, "I want five shillings on them;" the shopman asked him if they were silver, and he said they were; but the shopman, upon testing them, found they were not, and gave the man into custody: this was holden to be an attempt to obtain money by false pretences, and the party was convicted. *R. v. Ball, Car. & M. 249; and see R. v. Holloway, ante, p. 376.*

Cheat, at Common Law.

See upon this subject, 2 *East, P. C.* 816—825. *Russ.* 275—286. It may now be punished with hard labour, as well as imprisonment. 14 & 15 *Vict. c. 100, s. 29. Ante, p. 184.*

12. *Receiving Goods stolen, &c.**Receiving Stolen Goods.**Indictment against Principal and Receiver.*

—) The jurors for our Lady the Queen, upon their
to wit. { oath present, that A. B., on the — day of —,
in the year of our Lord —, feloniously did steal, take, and
carry away [two cloth coats and five linen shirts] of the
goods and chattels of C. D. And the jurors aforesaid upon
their oath aforesaid do further present that E. F., on the day
and year aforesaid, feloniously did receive the goods and
chattels above mentioned [or four linen shirts, being parcel of
the goods and chattels above mentioned] so as aforesaid felo-
niously stolen, taken, and carried away, he the said E. F. then
well knowing the said goods and chattels [last mentioned] to
have been feloniously stolen, taken, and carried away: against
the form of the statute in such case made and provided, and
against the peace of our Lady the Queen, her crown and dig-
nity. [*Formerly the offence of receiving stolen goods was a
misdemeanor only; when of course the receiver could not be
indicted with the principal felon. By stat. 3 W. & M. c. 9,
s. 4, and by stat. 5 Ann. c. 31, s. 5, the receiver was made
an accessory after the fact; since which he may be indicted
with the principal,—or alone after the principal has been
convicted,—or alone as for a substantive felony, whether the
principal be convicted or amenable to justice or not. 7 & 8
G. 4, c. 29, s. 54. See the next form.*]

*As to receiving a part only of the goods stolen,—where the
indictment charged the principal with stealing a live sheep,*

of the goods and chattels of C. D., and charged the receiver with receiving twenty pounds weight of mutton, part of the goods as as aforesaid feloniously stolen, the judges held it to be correct. *R. v. Cowell and Green*, 2 East, P. C. 617. And the same, if the whole of the chattel be received, after it has been converted into something of a different form from what it had when stolen. But where one of two prisoners was indicted for stealing six bank-notes of 100l. each, and the other for receiving them, and it appeared that the one after stealing them, got them changed for 20l. notes, some of which the other received: it was holden that the latter could not be convicted, for he did not receive the notes that were stolen. *R. v. J. & G. Walkley*, 4 Car. & P. 132.

As to the punishment of the principal felon, see ante, tit. "Larceny."

Receiver,—felony, transportation for not more than fourteen years, or less than seven;—or imprisonment [with or without hard labour, s. 4] for not more than three years, and if a male, to be once, twice, or thrice publicly or privately whipped, if the court shall think fit. 7 & 8 G. 4, c. 29, s. 54. As to the venue, see ante, p. 71. Costs, ante, p. 186; and costs of apprehension, ante, p. 189.

Indictment against a Receiver as for a substantive Felony.

— } The jurors for our Lady the Queen, upon their
to wit. } oath present, that A. B., on the — day of —,
in the year of our Lord —, feloniously did receive [four linen
shirts] of the goods and chattels of C. D., then lately before
stolen, taken, and carried away by a certain evil-disposed
person; he the said A. B. then well knowing the said goods
and chattels to have been feloniously stolen: against the form
of the statute in such case made and provided, and against the
peace of our Lady the Queen, her crown and dignity. [Where
the indictment stated the larceny to have been committed by
a certain "evil-disposed person," without saying "to the
jurors aforesaid unknown," *Tindal, C. J.*, held it to be suf-
ficient; for the offence is, not the receiving of stolen goods
from any particular person, but receiving them knowing
them to have been stolen. *R. v. Jervis*, 6 Car. & P. 156.
Thomas's case, 2 East, P. C. 781, S. P. For the same rea-
son, it is unnecessary to state that the defendant received
them from "the said evil-disposed person."

By stat. 14 & 15 Vict. c. 100, s. 15, after reciting that it often happens that the principal in a felony is not in custody or amenable to justice, although several accessories to such felony, or receivers at different times of stolen property the

subject of such felony, may be in custody and amenable to justice,—for the prevention of several trials, it is enacted that any number of such accessories or receivers may be charged with substantive felonies in the same indictment, notwithstanding the principal felon shall not be included in the same indictment, or shall not be in custody or amenable to justice. And these several accessories may, it seems, be all included in the same count, as if they had jointly received the property; for by sect. 14, upon an indictment against two or more for jointly receiving stolen goods, the jury may find all or any of them guilty, who shall be proved to have separately received any portion of the goods, knowing the same to have been stolen.

Felony; transportation for not more than fourteen years, or less than seven;—or imprisonment [with or without hard labour, s. 4] for not more than three years, and if a male, to be once, twice, or thrice publicly or privately whipped, if the court shall think fit. 7 & 8 G. 4, c. 29, s. 54. As to costs, see ante, p. 186; and as to costs of apprehension, ante, p. 189.

Indictment for Stealing and Receiving.

— } The jurors for our Lady the Queen, upon their
to wit. } oath present, that A. B. and E. F., on the — day
of —, in the year of our Lord —, feloniously did steal,
take, and carry away [two cloth coats and five linen shirts] of
the goods and chattels of C. D.: against the peace of our Lady
the Queen, her crown and dignity. (*Second count.*) And the
jurors aforesaid, upon their oath aforesaid, do further present,
that the said A. B. and E. F., on the said — day of —, in
the year aforesaid, feloniously did receive [two cloth coats and
five linen shirts] of the goods and chattels of C. D., then lately
before stolen, taken, and carried away by a certain evil-dis-
posed person, they the said A. B. and E. F. then well knowing
the said last-mentioned goods and chattels to have been felo-
niously stolen: against the form of the statute in such case
made and provided, and against the peace of our Lady the
Queen, her crown and dignity. [*By stat. 11 & 12 Vict.*
c. 46, s. 3, “in every indictment for feloniously stealing pro-
perty, it shall be lawful to add a count for feloniously
receiving the same, knowing it to have been stolen; and in
any indictment for feloniously receiving property knowing it
to have been stolen, it shall be lawful to add a count for
feloniously stealing the same property; and where any such
indictment shall have been preferred and found against any
person, the prosecutor shall not be put to his election, but it
shall be lawful for the jury who shall try the same, to find

a verdict of guilty, either of stealing the property, or of receiving it knowing it to have been stolen; and if such indictment shall have been preferred and found against two or more persons, it shall be lawful for the jury who shall try the same, to find all or any of the said persons guilty, either of stealing the property or of receiving it knowing it to have been stolen, or to find one or more of the said persons guilty of stealing the property, and the other or others of them guilty of receiving it knowing it to have been stolen." And the prosecutor is not confined to one count for receiving, but there may be as many counts for receiving as there are for stealing. *R. v. Beeton*, 2 Car. & K. 960. Where the second count charged a receiving of the goods "so as aforesaid feloniously stolen" (referring to the first count), and the defendant was acquitted on the first count and found guilty on the second, —it was moved in arrest of judgment that as the defendant was acquitted of the stealing, it was tantamount to finding that the goods were not stolen, and therefore a receiving of them could not be an offence: but the court held that whether this were so or not, the finding of the jury on one count, could not, in arrest of judgment, be used to impeach their finding upon another, however contradictory they might be, and therefore the verdict on the second count must be deemed correct. *R. v. Craddock*, 15 Shaw's J.P. 20. The count for receiving, in the above form, it will be perceived, is for a substantive felony; and it must necessarily be so. Where the indictment, preferred in Dorsetshire, contained a count against two men for stealing a sheep in the county of Dorset, and one count against a third party for receiving it in the county of Somerset, as for a substantive felony, but alleging it to be the same sheep as was mentioned in the former count: the court of criminal appeal held that the party ought not to have been convicted on the last count, as it did not show upon the face of it how a court in the county of Dorset should take cognizance of an offence alleged to have been committed in the county of Somerset. *R. v. Martin*, 2 Car. & K. 950. Such a case however cannot occur now, for it is no longer necessary to state the place where the offence was committed in the body of the indictment; 14 & 15 Vict. c. 23, ante, p. 85; and now it will simply be a question at the trial whether the facts proved bring the case within the jurisdiction of the court. Also, the better mode of framing the indictment, is to have each count against all the defendants, as in the above form, and then leave the jury to find them all guilty on one of the counts, or some on one count and some on another, according to the evidence.

Evidence.

To maintain this indictment, the prosecutor must prove—

1. The larceny, as *ante*, pp. 371, 369. The principal felon may be a witness against the receiver; *Patram's case*, 2 East, P. C. 782. *Haslam's case*, *Id.*; and where two men, Hinks and Weywood, were indicted for stealing, and Williams for receiving, and Weywood pleaded guilty, and was then called as a witness for the prosecution against the other two: the judges held that he was a competent witness. *R. v. Hinks et al.*, 2 Car. & K. 462. 1 Den. C. C. 84. See *ante*, pp. 153, 154. And he may now be a witness, even although judgment have been passed upon him. See *stat. 6 & 7 Vict. c. 85, s. 1, ante*, p. 155. But a confession by the principal, cannot be read in evidence against the receiver, for any purpose. Where the principal felon made a confession before the magistrate, in the presence of the receiver, not only of his own guilt, but also of matters affecting the prisoner as receiver, the judge at the trial of the receiver as for a substantive felony, received evidence of the confession as far as respected the principal's guilt, in proof of the larceny, but not what was said in it with respect to the prisoner: the prisoner being convicted, the judges held the conviction to be wrong, as the confession of the principal was not admissible in evidence against the receiver for any purpose; and many of the judges held, that even if the principal were convicted, and the indictment against the receiver stated the guilt only, and not the conviction, the conviction could not be received in evidence to prove it. *R. v. Turner*, Ry. & M. 347. But if the indictment state the conviction of the principal, the record of the conviction or an examined copy of it, is clearly evidence to prove it; see *R. v. Baldwin*, R. & Ry. 241; and in *R. v. Blick*, 4 Car. & P. 277, this was allowed by Bosanquet, J., even although it appeared to be a conviction on a plea of guilty. But the receiver may in all cases controvert the guilt of the principal: if tried with the principal, he may avail himself of every matter of fact, and every point of law, tending to his acquittal, for it necessarily and directly tends to his own acquittal; or if the receiver be tried alone, he is not concluded even by the record of the principal's conviction, but may notwithstanding controvert his guilt. *Fost.* 365.

Where the larceny is stated to have been committed by a person unknown, proof that it was done by J. S. will not support the indictment. *R. v. Walker*, 2 Camp. 264. But where it was so stated, the judges held it to be no objection that the grand jury had at the same assizes found a bill for larceny of the same goods against J. S. *R. v. Bush*, R. & Ry. 372.

As to the goods stolen and received, see *R. v. Cowell and Green*, and *R. v. J. & G. Walkley*, *ante*, p. 474.

2. The receiving of the goods, &c., by the defendant. And he must have received them actually into his custody, to be deemed a receiver, within the meaning of the statute. Where three men, Straughan, Williamson, and Wiley, were indicted for stealing and receiving poultry, and it appeared that Straughan and Williamson were seen to go into the house of Wiley's father, at four o'clock in the morning, in January, Straughan having a sack upon his back; Wiley lived with his father, and was a higgler, attending the markets with a horse and cart, and he was the only person then up in the house; after remaining in the house about ten minutes, Straughan and Williamson were seen coming out of the house, by the back door, with the sack, preceded by Wiley with a light, and they went into the stable and shut the door; shortly after, a policeman, who had been watching them, went in, saw the sack upon the floor with the mouth tied, and the three men standing round it, seemingly bargaining about it, and the bag was found to contain a number of cocks, hens, and ducks, which were afterwards proved to be stolen from a Mr. Davison: Straughan and Williamson being found guilty of stealing, and Wiley of receiving these poultry, six of the judges of the criminal appeal court held that Wiley ought not to have been convicted, because he never had the poultry in his possession; three held the conviction to be right. *R. v. Wiley*, 20 *Law J.* 4 m. Where W. and J. Hill were indicted for stealing twenty fowls, and Catherine Hill, the wife of W. Hill, for receiving ten of them, knowing them to have been stolen; the two Hills, after stealing the fowls, put them into a box and hamper, and sent them by the coach to Birmingham, saying that a person would call there for them; Catherine Hill accordingly called the next day at the coach office, and inquired for the box and hamper, and being shown them she said they were hers; they were not however given to her, but she was apprehended, and charged as a receiver; the three being found guilty, the judges of the criminal appeal court held the conviction of the woman to be wrong, for she never received or had possession of the fowls, the persons at the coach office never having parted with the possession. *R. v. Hill*, 2 *Car. & P.* 978. Where two prisoners, Wade and Leigh, one charged with stealing, the other with receiving, a watch and two handkerchiefs, being in custody in a lock-up house together, Wade told Leigh that he had "planted" the watch and handkerchief in the soot cellar of Leigh's house; and Leigh being afterwards discharged, went immediately to the cellar, found the articles, and pawned them; Pollock, B., held that if Wade told Leigh where to find the things, for the

purpose of his finding them, then Leigh was guilty of receiving; but if he took them in opposition to Wade or against his will, it would be questionable whether it would in law be a receiving within the Act. *R. v. Wade et al.*, 1 Car. & K. 739. Where a lad stole a brass weight from his master, and being detected, it was taken from him in his master's presence; but it was given back to him with his master's consent, in order that he might sell it to the prisoner, to whom he had before sold other things he had stolen; he sold it accordingly to the prisoner, and the latter being indicted for receiving, it was objected that at the time the brass weight was purchased by him, it could not be deemed stolen property, for it was virtually in the possession of the master: but Coleridge, J., although he took a note of the objection, afterwards sentenced the prisoner to transportation. *R. v. Lyons*, Car. & M. 217. But if the goods be found in the party's possession, that will of itself raise a presumption of the party's having received them, if nothing appear from which a presumption would arise of his having stolen them. As this however is equivocal, and is often deemed to prove a larceny by the party, rather than a receiving, it is always prudent in such a case to have a count for larceny as well as a count for receiving, in the indictment, as in the last of the three forms, *ante*, p. 475. Where goods stolen, were shortly afterwards found concealed in an old engine-house, and the place being watched, the prisoners were observed to go there and take them away: the prisoners being indicted as receivers, and there being no evidence of the goods having been stolen by any of them, Patteson, J., after remarking that this seemed to be evidence more of a stealing than receiving, told the jury that if they were of opinion that the prisoners stole the goods, they must be acquitted on the present indictment; and the jury being of opinion that the prisoners stole them, they were acquitted accordingly. *R. v. Dursley et al.*, 6 Car. & P. 399. There are other cases also in which it may be doubtful whether the prisoner has been guilty of a larceny or of receiving, (*see R. v. Dyer and Disting*, 2 East, P. C. 767. *R. v. Atwell et al.*, *Id.* 768,) in which it may be prudent to have counts for both offences. Where two or more are indicted for receiving, although that implies a joint receipt by all, yet the jury may find all or any of them guilty, who shall be proved to have separately received any portion of the goods knowing them to have been stolen. 14 & 15 Vict. c. 100, s. 14.

3. That the defendant knew that the goods had been stolen, at the time he received them. This may be proved from the admissions or acts of the defendant, or by the proof of any facts from which the jury may infer it. *See ante*, p. 121. Buying the goods at an under value, is presumptive evidence

that the buyer knew they were stolen. 1 *Hale*, 619, 620. So, the jury may infer the guilty knowledge of the prisoner, from proof of his having concealed or endeavoured to conceal the goods, *R. v. Mansfield*, *Car. & M.* 140, or from his acts or conversation before or at the time of his receiving them. But the prosecutor will not be allowed to prove that at the time his goods were found in the prisoner's possession, goods of other persons of the same description had also been found in his possession which had previously been stolen ; for that is not proof of guilty knowledge. *R. v. Oddy*, 20 *Law J.* 198 m. Where however, upon an indictment against Henry Dunn for stealing, and against Martha Smith for receiving, a variety of articles the property of Dunn's master,—it appeared probable that Dunn stole these several articles at different times, but not impossible that he might not have stolen them all at the same time ; it appeared however that Smith received them at several times : at the trial, it was objected for Dunn, that the prosecutor should make his election as to which of the articles stolen he would proceed ; and for Smith, not only that the prosecutor should so elect, but that he should not give evidence of her receipt of other articles as proof of her knowledge that they had been stolen : the judge however held, that as it was not impossible that Dunn had stolen all the articles at the same time, he would not put the prosecutor to his election as to him ; as to Smith, the prosecutor should elect as to the receipt of what articles he would prosecute, but that other instances of her receiving might be given in evidence, to prove her guilty knowledge : and the judges afterwards held this decision to be right. *R. v. Dunn and Smith*, *Ry. & M.* 146.

Verdict.] If the prosecutor fail to prove the larceny, the receiver must of course be acquitted. Or if he fail to prove the receipt by the defendant, or his knowledge that the goods were stolen, the defendant must of course be acquitted. Where there is a count for stealing and also a count for receiving, in the same indictment against the same person, the jury may find him guilty of the stealing, or of the receiving ; 11 & 12 *Vict. c.* 46, s. 3 ; but they cannot give a general verdict. Or if there be such an indictment against several, the jury may find all or any of the defendants guilty of stealing, or of receiving, or one or more of them guilty of stealing, and the other or others of them guilty of receiving. 11 & 12 *Vict. c.* 46, s. 3. Or if the indictment be against two or more, for jointly receiving stolen goods, the jury may find all or any of them guilty, who shall be proved to have separately received any portion of the goods, knowing the same to have been stolen. 14 & 15 *Vict. c.* 100, s. 14. This latter formerly could not be done ; if two or more were charged with jointly receiving, a joint

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receipt must have been proved, otherwise the defendants must have been acquitted. *R. v. M. and J. Messingham, Ry. & M. 257.*

Upon conviction of the receiver, the owner of the goods is entitled to restitution, as in larceny. 7 & 8 G. 4, c. 29, s. 57. *See ante*, p. 192.

Receiving Goods obtained by false Pretences.

Indictment.

—— } The jurors for our Lady the Queen, upon their
to wit. } oath present, that A. B., on the —— day of ——,
in the year of our Lord ——, unlawfully did receive one silver
tea-pot [*“chattel, money, valuable security, or other pro-
perty whatsoever, the stealing, taking, obtaining, or convert-
ing whereof is made an indictable offence by this Act”* (7 & 8
G. 4, c. 29)] of the goods and chattels of C. D., by one B. F.,
[or by a certain ill-disposed person] then lately before un-
lawfully obtained from the said C. D. by false pretences, he
the said A. B. then well knowing the said goods and chattels
to have been unlawfully obtained by false pretences: against
the form of the statute in such case made and provided, and
against the peace of our Lady the Queen, her crown and
dignity.

*Misdemeanor; transportation for seven years;—or im-
prisonment [with or without hard labour, and the whole or
any part of it solitary, s. 4,] for not more than two years,
and if a male, to be once, twice, or thrice publicly or
privately whipped. 7 & 8 G. 4, c. 29, s. 55.*

Evidence.

To maintain this indictment, the prosecutor must prove—

1. The obtaining of the goods mentioned in the indictment, from C. D., by false pretences, as directed, *ante*, p. 465.

2. The receipt and guilty knowledge, as in the last case, *ante*, p. 478, 479.

13. Piracy.

Piracy at Common Law.

Indictment.

—— } The jurors for our Lady the Queen, upon their
to wit. } oath present, that A. B., on the —— day of ——,
in the year of our Lord ——, upon the high sea, on board of
y

a certain ship called —, in and upon C. D. piratically and feloniously did make an assault, and him the said C. D. did then piratically and feloniously put in fear and danger of his life, and did piratically, feloniously, and violently steal, take, and carry away from the said C. D. [*here state what was taken by the defendant*] of the goods and chattels of certain subjects of our Lady the Queen [to the jurors aforesaid unknown] and then being in the custody and possession of the said C. D.: against the form of the statute in such case made and provided, and against the peace of our Lady the Queen, her crown and dignity. [*You may add another count, stating the goods to be the property of the captain of the ship, as he is bailor of them. It is not necessary to state that the offence was committed within the jurisdiction of the Admiralty; R. v. Jones et al., 2 Car. & K. 165, 1 Den. C. C. 101; but it might be prudent to state it, if the case were to be tried before the Admiralty judge by commission, which now, however, seldom occurs. I have, in the above form, stated the offence to have been committed "feloniously," out of deference to the authority of Hawkins, (1 Hawk. c. 37, s. 15), who says that the indictment must have both the words piraticè and felonice;—why, I know not, because piracy at common law is not a felony, and Hawkins himself says that a pardon of all felonies does not include the offence of piracy. Id. s. 13. 3 Inst. 112. Co. Lit. 391 b. So resolved by the judges H. 2, Jac. 1, Moor, 756. Arch. Dig. P. C. 421. As to the venue, see ante, p. 66.*

The punishment of piracy, considered as a common law offence, is now somewhat uncertain. As an offence against the law of nations, (for it is so), it was always, and is still, punishable with death. As recognized by the common law of England, it was formerly deemed petit treason, if committed by a subject. 40 Ass. 25. Bro. Abr. Corone, pl. 118, Treason, pl. 16. But that was altered by stat. 25 Ed. 3, st. 5, c. 2. Afterwards by stat. 28 Hen. 8, c. 15, s. 3, it was made punishable with death; but the legislature have repealed that statute of Hen. 8, by stat 1 Vict. c. 88, s. 1. By stat. 7 & 8 G. 4, c. 28, s. 2, however, all offences prosecuted in the high court of Admiralty (of which piracy is one), shall on every first and subsequent conviction, be subject to the same punishment, whether of death or otherwise, as if such offences had been committed upon the land. And as piracy is the same offence upon the sea as robbery is upon land, it should seem that it is now punishable in the same manner. See ante, p. 417. As to costs, see ante, p. 188. How and where the offence is to be tried, see ante, p. 68.

Evidence.

To maintain this indictment, the prosecutor must prove—

1. The force or violence or threats used by the prisoner, in taking from him or compelling him to deliver up the property, as in robbery. *See ante*, p. 418. According to Sir Leoline Jenkins (1 *Jenk. xciv.*), this is as essential a part of the offence of piracy, by the marine law, as it is of robbery upon land.

2. A larceny of the property mentioned in the indictment,—the taking being either from the person of the prosecutor, or a taking openly and before his face, of property which is under his immediate and personal care and protection,—as in robbery. *See ante*, p. 421. There must be an actual taking; if pirates attack a vessel, and the master, in order to redeem her, give an oath to pay a certain sum, this is not piracy by the law of England; *Molloy*, 64, s. 18. *And see Palache's case*, 1 *Ro. Rep.* 175; but if there be an actual taking, it is piracy, although the pirate afterwards allow the party to proceed on his voyage. *Jenk. xcvi.* And it must be done *animo depredandi*, without any *bonâ fide* claim of right. *Molloy*, 71, s. 33. *See R. v. Serva*, 1 *Den. C. C.* 104. It must be upon the high seas, within the jurisdiction of the Admiralty, as already described, *ante*, p. 67. It must be done without authority from any prince or state; if done by the authority of any prince or state, it cannot be considered piracy, for a nation never can be deemed pirates;—fixed domain, public revenue, and a certain form of government, exempt a people from that character. 2 *Brown, C. L.* 461. *Jenk.* 790. Formerly an outrage of this kind, by one British subject upon another, under the authority of a commission from a foreign prince, was not deemed piracy; but it was made so by stat. 11 & 12 W. 3, c. 7, and 18 G. 2, c. 30, s. 1. Also, if the prosecutor be a foreigner, it must appear that his country was in amity with this, at the time of the caption, and that the defendant was of a country which was then in amity with his own; *By all the Judges*, 2 *R.* 3, 2; at least the contrary must not appear, otherwise the defendant must be acquitted. 1 *Jenk. xciv.* *Palache's case*, 1 *Ro. Rep.* 175, 3 *Bulst.* 27. 4 *Inst.* 152, 154. As to the property taken, it is immaterial of what value it is; the offence in this respect is the same as robbery. *Molloy*, 64, s. 18. It seems also that attacking a vessel, and forcibly taking away some of her crew, to sell them for slaves, is piracy; although such an offence, committed within the body of a county, would not be robbery. *Molloy*, 63, s. 16.

Principals.] All persons found on board a pirate vessel, are presumed to be pirates, unless the contrary appear in evidence; *Per Holt, C. J., in the case of Dawson et al., 5 St. Tr. 14*; but the owner of such vessel, if he be not on board at the time, cannot be proceeded against *criminaliter*, unless he were privy to the acts of his captain and crew.*

Piracy and Wounding, &c.

By stat. 1 Vict. c. 88, s. 2, "whosoever, with intent to commit, or at the time of, or immediately before, or immediately after committing, the crime of piracy, in respect of any ship or vessel, shall assault, with intent to murder, any person being on board of or belonging to such ship or vessel,—or shall stab, cut, or wound any such person, or unlawfully do any act by which the life of such person may be endangered,—shall be guilty of felony, and being convicted thereof, shall suffer death as a felon." Accessories before the fact, the same punishment; and accessories after the fact, imprisonment [with or without hard labour, s. 5,] for not more than two years. *Id.* s. 4. *See ante*, p. 424.

Piracy by Statute.

The following offences have been declared or made piracy by statute, and were formerly punishable with death; but by stat. 1 Vict. c. 88, s. 3, they are now punishable with transportation for life or not less than fifteen years,—or with imprisonment for not more than three years,—the imprisonment to be with or without hard labour, and may be solitary for not more than a month at a time, or three months in a year; *Id.* s. 5; accessories before the fact, the same punishment; accessories after, imprisonment [with or without hard labour, s. 5] for not more than two years. *Id.* s. 4.

1. Robbery or any other act of hostility by a British subject, under colour of a commission from the Queen's enemies. 11 & 12 W. 3, c. 7, s. 8. 18 G. 2, c. 30, s. 1.

2. Master or seamen turning pirates, and running away with the ship or goods, &c.;—or yielding them up voluntarily to a pirate;—or inciting a master or seamen to turn pirate, or to run away with, or yield up his ship or cargo to pirates;

* These authorities are abstracted and abbreviated from a work of the author, "A Digest of the Pleas of the Crown," 8vo., published in 1812, where the reader may find all the authorities upon the subject.

—or a seaman laying violent hands on his commander, to prevent him from defending the ship or goods;—or confining the master, or endeavouring to make a revolt in the ship. 11 & 12 W. 3, c. 7, s. 9.

3. Forcibly boarding a ship or vessel, and throwing overboard or destroying goods belonging to it. 8 G. 1, c. 24, s. 1.

4. Trading with pirates, or furnishing them with ammunition, provision, &c., or fitting out a ship for that purpose. 8 G. 1, c. 24, s. 1. *And see* 22 & 23 C. 2, c. 11.

As to other offences upon the high seas, *see ante*, p. 67.

SECTION V.

Offences against the Property of Individuals, by Malicious Injuries.

1. *Malicious Injuries to Houses, &c.*

Setting fire to a House, Out-house, &c.

Indictment.

—) The jurors for our Lady the Queen, upon their
to wit.) oath present, that A. B., on the — day of —,
in the year of our Lord —, unlawfully, maliciously, and
feloniously did set fire to a certain dwelling-house [*“house,
stable, coach-house, out-house, warehouse, office, shop, mill,
malt-house, hop-oast, barn, granary, or any building or
erection used in carrying on any trade, or manufacture, or
any branch thereof”*] in the parish of —, in the county of
—, in the possession of C. D., [*or of him the said A. B.*]
with intent thereby then to injure the said C. D. [*or to de-
fraud a certain insurance company called —*]: against
the form of the statute in such case made and provided, and
against the peace of our Lady the Queen, her crown and
dignity.

*Felony; transportation for life, or not less than fifteen
years;—or imprisonment, [with or without hard labour,
and solitary for not more than one month at a time, or
three months in a year, s. 12] for not more than three years.
1 Vict. c. 89, s. 3. Accessories before the fact, the same
punishment; accessories after the fact, imprisonment, &c.,
for not more than two years. Id. s. 11. As to costs, see
ante, p. 186; costs of apprehension, ante, p. 189.*

Evidence.

To maintain this indictment, the prosecutor must prove—

1. A setting fire to the house in question, by the defendant. It is not essential to the offence that the house should be burnt, or destroyed by fire; it is sufficient if the party set fire to it, although the fire were instantly extinguished. Where, upon an indictment for this offence, it appeared that the wood of the floor had been charred in a trifling way, and that it had been at a red heat, but not in a blaze: this was holden to be a sufficient setting fire to the house, within the statute. *R. v. Parker*, 9 *Car. & P.* 45. So, where smoke was seen to issue from the thatch of an out-house, but no flame, and upon examining it, a ball of linen was found in it, which was on fire, and burnt through on one side of it, and some of the straw was burnt: this was holden to be a setting fire to the out-house, within the meaning of the Act. *R. v. Stallion*, *Ry. & M.* 398. But where it appeared that a lighted faggot had been placed on the boarded floor of a room, which scorched it black, but did not burn it: Cresswell, J., after conferring with Patteson, J., said they were of opinion that this was not a setting fire to the house, because the floor was not burnt; but they thought that it was not necessary, in order to bring a case within the meaning of the Act, that the wood should be in a blaze, for there are some species of wood will burn and entirely consume, without blazing at all. *R. v. Russell*, *Car. & M.* 541. But if the prosecutor fail in proving an actual setting fire to the house, the jury may find the defendant guilty of an attempt to commit it; 14 & 15 *Vict. c. 100*, s. 9, *ante*, p. 124; which will subject the defendant to transportation for not more than fifteen years or less than ten, or imprisonment, [with or without hard labour, and solitary for not more than a month at a time or three months in a year, s. 11] for not more than two years. 8 & 9 *Vict. c. 25*, s. 7.

2. That the building set fire to, was that mentioned in the indictment. The word "house" in the statute, seemingly means a dwelling-house. The only other equivocal expression used in the statute is "out-house;" the other terms, stable, coach-house, warehouse, shop, &c., need no explanation. What is an out-house in which burglary may be committed, has been fully discussed, *ante*, p. 335; and what is an out-house within the curtilage, the breaking and entering of which, and stealing therein, is punishable by stat. 7 & 8 *G. 4*, c. 29, s. 14, has been fully described, *ante*, p. 345. Upon an indictment, charging the prisoner in one count with setting fire to a house, in a second with setting fire to an out-house,

It appeared in evidence that the building in question consisted of a school-room, separated from the dwelling-house of the schoolmaster by a narrow passage, but within the same curtilage; the tiled roof of the dwelling-house also reached across the passage and covered a part of the school-room, the rest of the school-room being thatched: the judges held that this was properly described as an out-house. *R. v. Winter, R. & Ry.* 295. Upon an indictment for setting fire to an out-house, it appeared that the place in question was situate in an inclosed field, at the distance of a furlong from the dwelling-house, partly boarded and enclosed, and partly open to the field for beasts to shelter in: Six of the judges held this to be an out-house within the meaning of the Act; but seven were of a contrary opinion, and the prisoners were pardoned. *R. v. Ellison and Vines, Ry. & M.* 336. This, however, is now fully provided for by stat. 7 & 8 Vict. c. 62, s. 1, *post*, p. 491. So, where a building seven feet high, had four walls of stone without mortar, the roof was of broom, turf, and straw, and was supported by two pieces of timber, it had no window, and the door had neither lock nor bolt; it had been erected by the prosecutor at his lime works, for his workmen to take their meals in, and a poor person, engaged on the road, and having no house, had, to the prosecutor's knowledge, but without his permission, slept in it for three weeks previously: Tindal, C. J., held that this was not a house within the meaning of the Act, for the man who slept in it did so without leave; nor was it an out-house. *R. v. England et al., 1 Car. & K.* 533. So, where the building appeared to be more than one hundred yards distant from any house, and a much greater distance from the dwelling-house of the owner and occupier; it was formerly a kiln or oven for baking bricks, but was latterly used for keeping a cow: Taunton, J., held that it was neither a stable nor out-house within the meaning of the Act. *R. v. Haughton, 5 Car. & P.* 555. So, where the building appeared to be a kind of cart-hovel, consisting of a stubble roof supported by uprights, situate by itself in a field, some distance from any dwelling: Vaughan, B., was of opinion that it was not an out-house within the meaning of this section, and intended to reserve the point for the opinion of the judges, but the prisoner was acquitted on the merits. *R. v. Parrot, 6 Car. & P.* 402. But a pigstye, in an inclosed yard at the back of the dwelling-house, and within the curtilage, has been deemed such an out-house. *R. v. James, 1 Car. & K.* 303. Where an indictment on this statute for setting fire to a building, described it in different counts as a "warehouse," a "shop," an "office," a "shed," and a "building used for carrying on a certain trade, that is to say the trade of a bullder," it appeared that the prosecutor, a gentleman, had built several houses upon his own freehold, for the purpose of

letting them; he found his own materials, superintended the building, &c.; the erection in question was of wood with a slate roof and glass windows, called the "workshop," in which the seasoned wood was kept and worked up, and it was also a place of deposit for the tools: the judges of the criminal appeal court seemed to think that the prosecutor carried on the trade of a builder, and the erection in question was properly described as a building used for carrying on the trade of a builder, within this statute, 1 Vict. c. 89, s. 3; but they were clearly of opinion that it was a shed, within the meaning of stat. 7 & 8 Vict. c. 62, s. 1, *post*, p. 491. *R. v. Amos*, 20 Law J. 103, *m*.

3. The situation and ownership of the house as stated in the indictment. This is proved in the same manner as in burglary. *See ante*, pp. 336, 339. It is immaterial whether it be the house of a third person, or of the prisoner himself, except with reference to the intent with which the offence was committed. Where the house was in some counts described as the dwelling-house of John Fearn, and in others as the dwelling-house of the prisoner, and it appeared that Fearn, although he lived in part of the house, and let the other rooms to the prisoner and other lodgers, had some time before taken the benefit of the insolvent Act, and had assigned the house to the provisional assignee, but that assignee had never taken possession of it: the judges held that as Fearn had possession of the house, (the possession of his tenants being his possession), it was properly described in the indictment as his; and if not, the prisoner's own room, to which the fire was confined, might be described as his house. *R. v. Ball*, Ry. & M. 30. Where a farmer, named Wright, provided a cottage for one of his labourers named Wallis, in part of his wages, and being dissatisfied with him, discharged him, but allowed him to remain a month longer in the cottage, that he might have time to procure another dwelling; a few days after the month expired, Wright went to take possession, when Wallis's wife set fire to the cottage, with intent to burn it: being indicted for setting fire to a house in the possession of Wallis, with intent to injure Wright, the judges held the description to be correct, for as Wallis had not actually quitted the cottage, it was properly described as being in his possession. *R. v. Margaret Wallis*, Ry. & M. 344.

4. The intent with which the offence was committed, as laid in the indictment. Where the prisoner is charged with setting fire to the house of a third person, the very fact of his having wilfully done so, is strong presumptive evidence that he did it maliciously, and with intent to injure the owner or occupier. Even where a man set fire to a house, merely for

Setting fire to a House, a Person being therein. 480

the purpose of obtaining the reward for giving the first information of it at the engine station, and the indictment alleged the intent to be to injure the occupier, this was holden to be correct, for it was the natural effect of the act, *R. v. Regan*, 14 *Shaw's J. P.* 467. Upon an indictment for setting fire to a cotton mill, with intent to injure the occupiers, it appeared that the prisoner, who was a workman in the employ of the occupiers, had confessed that he had set fire to it, and being asked "how he came to do it," he said "he did not know, except that the Devil put it into his head;" the witnesses for the prosecution also said that the prisoner was a harmless inoffensive man, that there never had been any quarrel between him and his masters, or the clerks, and that they were not aware of any motive which could induce him to do the act. the judges held that as the prisoner had set fire to the mill wilfully, he must be deemed to have intended that which must necessarily be the consequence of his act, namely, an injury to the occupiers of the mill; and the prisoner had judgment accordingly. *R. v. Farrington*, *R. & Ry.* 207.

But where a man is charged with setting fire to a house in his own occupation, the intention cannot be inferred merely from the act itself, but must be proved by giving in evidence other circumstances, from which the jury may fairly presume it. Upon an indictment for setting fire to a house, with intent to defraud an insurance company, the policy offered in evidence appeared to have been altered, to make it applicable to another house, to which the goods insured had been removed, and had not been restamped after the alteration: six of the judges held that the policy ought not to be received in evidence, and that, as the insurance could not otherwise be proved, the prisoner ought to be acquitted; five of the judges were of a different opinion. *R. v. Gilson*, *R. & Ry.* 138.

Setting fire to a House, any Person being therein.

Indictment.

— } The jurors for our Lady the Queen, upon their
to wit. } oath present, that A. B., on the — day of —,
in the year of our Lord —, unlawfully, maliciously and
feloniously did set fire to a certain dwelling-house of C. D.,
in the parish of —, in the county of —, one E. F. being
then in the said dwelling-house: against the form of the
statute in such case made and provided, and against the peace
of our Lady the Queen, her crown and dignity. [*If there be
any doubt as to there being any person in the house at the
time, add a count according to the last form, ante, p. 485 ;*

490 *Setting fire to a House, a Person being therein.*

for, otherwise, if upon the above indictment you failed in proving E. F. to have been in the house, the defendant could not be found guilty of setting fire to the house with intent, &c., there being no intent to injure or defraud laid in the above count. R. v. Paice, 1 Car. & K. 73. R. v. Fletcher, 2 Car. & K. 215.

Felony; death. 1 Vict. c. 89, s. 2. Accessories before the fact, the same punishment; accessories after the fact, imprisonment [with or without hard labour, and solitary for not more than one month at a time, or three months in the year, s. 12], for not more than two years. Id. s. 11.

Evidence.

To maintain this indictment, the prosecutor must prove—

1. The setting fire to the house;—that it was a dwelling-house, as stated in the indictment;—and the situation and ownership of it:—as in the last case. As to what shall be deemed a dwelling-house, see under the title “Burglary,” *ante*, p. 333; and as to the ownership, *see also ante*, p. 336.

2. That the person mentioned in the indictment, was in the house at the time. Where it appeared that the prisoner set fire to an out-house adjoining to, and under the same roof with the dwelling-house, and at that time the prosecutrix was in the dwelling-house; the fire afterwards communicated to the dwelling-house, but at that time the prosecutrix had left it: Patteson, J., held that the capital part of the charge had not been made out, as the prosecutrix was not in the dwelling-house at the time the fire reached it; and as there was no allegation in the indictment of an intent to injure any one, the prisoner could not be found guilty of setting fire to the house merely. *R. v. Ann Fletcher, 2 Car. & K. 215.* So, where the indictment stated that the prosecutor and his wife were in the house at the time, but there was no satisfactory evidence of that, Wightman, J., held that the defendant could not on that indictment be convicted of setting fire to the house merely, as there was no allegation in it of an intent to injure or defraud. *R. v. Paice, 1 Car. & K. 73.* Whether in such a case, upon failure of proving that the person mentioned in the indictment was in the house, the indictment may now be amended by stat. 14 & 15 Vict. c. 100, s. 1, *ante*, p. 100, by substituting the name of some other person who can be proved to have been in the house at the time, may be worthy of consideration.

Setting fire to Farm Buildings, &c.

Indictment.

— } The jurors for our Lady the Queen, upon their
to wit. { oath present, that A. B., on the — day of —,
in the year of our Lord —, unlawfully, maliciously, and
feloniously did set fire to a certain shed [*“hovel, shed, or
fold, or any farm building, or any building or erection used
in farming land,”*] in the parish of —, in the county of
—, in the possession of C. D., [*or of him the said A. B.,*]
with intent thereby then to injure the said C. D., [*or to de-
fraud a certain insurance office called —*]: against the
form of the statute in such case made and provided, and
against the peace of our Lady the Queen, her crown and
dignity. [*You may add a count according to the next form,
if necessary.*]

*Felony; transportation for life or not less than fifteen
years;—or imprisonment for not more than three years;
7 & 8 Vict. c. 62, s. 1; and if a male under the age of
eighteen, he may be publicly or privately whipped, not ex-
ceeding thrice, if the court so direct. Id. s. 3. Nothing is
mentioned in the Act as to hard labour; but, as by the 4th
section, this Act is to be deemed a part of stat. 1 Vict. c. 89,
it should seem that the imprisonment may be, as directed by
that Act. See ante, p. 485. As to costs, see ante, p. 186;
costs of apprehension, Id. p. 189.*

Evidence.

To maintain this indictment, the prosecutor must prove—

1. A setting fire to the shed, &c., in question, as *ante*,
p. 486.

2. That the building set fire to, was of the description men-
tioned in the indictment. We have seen the difficulty which
arose in indicting for setting fire to such places, as outhouses,
on the stat. 1 Vict. c. 89. See *R. v. Ellison and Vines*,
R. v. England et al., *R. v. Haughton*, and *R. v. Parrot*,
ante, p. 487. And this Act was made to provide for the omis-
sion of such buildings in the former Act. Still a farm build-
ing, if within the curtilage of a dwelling-house, may in most
cases come within the former Act, either as a stable, outhouse,
barn, granary, &c.; and in such case, the indictment may be
framed on either Act, the punishment by both being the same.
The statute, however, is not confined to farm buildings, but

492 *Setting fire to Straw, &c. in Farm Buildings.*

the words "hovel, shed, or fold" are applicable to a hovel, shed, or fold used for any other purpose; and a temporary building used as a workshop by the workmen engaged in building some houses, and for keeping the tools and timber, &c., has been holden to be well described as a "shed," and the setting it on fire to be an offence within the above statute. *R. v. Amos*, 20 *Law J.* 103 *n.* *Ante*, p. 488.

3. The situation and ownership of the shed or building, as mentioned in the indictment. The proof of this is the same as in the last case, *ante*, p. 488.

4. The intent to injure or defraud, as in the last case, *ante*, p. 488.

Setting fire to Hay, Straw, &c., in a Farm Building, with intent to set fire to the Building.

Indictment.

—) The jurors for our Lady the Queen, upon their to wit. (oath present, that A. B., on the — day of —, in the year of our Lord —, unlawfully, maliciously, and feloniously did set fire to a large quantity of straw [*“hay, straw, wood, or other vegetable produce, being in any farm house or farm building,—or any implement of husbandry, being in any farm house or building,”*] then being in a certain farm building, to wit, a barn, of C. D., [*or of him the said A. B.,*] in the parish of —, in the county of —, with intent thereby then feloniously to set fire to the said farm building, and to injure the said C. D., [*or to defraud a certain insurance company called —*]: against the form of the statute in such case made and provided, and against the peace of our Lady the Queen, her crown and dignity.

Same punishment as in the last case. 7 & 8 Vict. c. 62, s. 2.

Evidence.

To maintain this indictment, the prosecutor must prove—

1. The setting fire to the straw, &c., as *ante*, p. 486.
2. That it was at the time in the farm building mentioned in the indictment; and the situation and ownership.
3. The intent thereby to set fire to the building itself. This may be proved from the expressions or acts of the defendant;

see ante, p. 119, 120; or by proving any facts from which the jury may reasonably infer it. If it were wilfully done, and would have had the effect of setting fire to the building if the fire had not been extinguished, this would well warrant the jury in thinking that the defendant set fire to the straw, for the purpose of setting fire to the building.

4. The intent to injure or defraud, as *ante*, p. 488.

Setting fire to a Church or Chapel.

Indictment.

— } The jurors for our Lady the Queen, upon their
to wit. } oath present, that A. B., on the — day of —,
in the year of our Lord —, unlawfully, maliciously, and
feloniously did set fire to the parish church [*“church or
chapel, or any chapel for the religious worship of persons
dissenting from the united church of England and Ire-
land”*] situate in the parish of —, in the county of —:
against the form of the statute in such case made and provided,
and against the peace of our Lady the Queen, her crown and
dignity.

*Felony; transportation for life, or not less than fifteen
years;—or imprisonment, [with or without hard labour,
and solitary for not more than a month at a time, or three
months in a year, s. 12] for not more than three years.
1 Vict. c. 89, s. 3. Accessories before the fact, the same
punishment; accessories after the fact, imprisonment, &c.,
for not more than two years. Id. s. 11. As to costs, see
ante, p. 186; costs of apprehension, ante, p. 189.*

Evidence.

To maintain this indictment, it must be proved—

1. That the defendant set fire to the church or chapel, as *ante*, p. 486. If it be proved that he did it wilfully, the jury may fairly presume that he did it maliciously.

2. That the church or chapel is situate as described in the indictment. And if the indictment state it to be a chapel for the religious worship of Protestant Dissenters or Roman Catholics, it must be proved to have been registered or recorded, as stated in the indictment; which may be done by the clerk of the peace producing the book, &c., in which the same was registered, or perhaps by an examined copy of the entry.

494 *Riotously demolishing a Church, House, &c.*

Riotously beginning to demolish a Church, House, &c.

Indictment.

— } The jurors for our Lady the Queen, upon their
to wit. { oath present, that A. B., E. F., and G. H., together with divers other persons to the jurors aforesaid unknown, on the — day of —, in the year of our Lord —, unlawfully, riotously, and tumultuously did assemble together, to the disturbance of the public peace; and being then so unlawfully, riotously, and tumultuously assembled together as aforesaid, did then unlawfully, feloniously, and with force [begin to] demolish [*“demolish, pull down, or destroy, or begin to demolish, pull down, or destroy”*] a certain dwelling-house of C. D., [*“any church or chapel, or any chapel for the religious worship of persons dissenting from the united church of England and Ireland, duly registered or recorded, —or any house, stable, coach-house, outhouse, warehouse, office, shop, mill, malt-house, hop-oast, barn, or granary,—or any building or erection used in carrying on any trade or manufacture, or any branch thereof,—or any machinery, whether fixed or moveable, prepared for or employed in any manufacture, or in any branch thereof,—or any steam engine or other engine for sinking, draining, or working any mine, or any staith, building, or erection used in conducting the business of any mine, or any bridge, waggon-way, or trunk for conveying minerals from any mine,”*] situate in the parish of —, in the county of —: against the form of the statute in such case made and provided, and against the peace of our Lady the Queen, her crown and dignity.

Felony; 7 & 8 G. 4, c. 90, s. 8; transportation for life, or for any term not less than seven years;—or imprisonment, with or without hard labour, for not more than three years. 6 & 7 Vict. c. 10.

Evidence.

To maintain this indictment, the prosecutor must prove—

1. That the prisoners and others, to the number of three at the least, assembled together, in a manner calculated, either from their numbers, threats, or gestures, &c., to inspire terror.

2. That the assembly began “with force” to demolish, pull down, or destroy the house in question. Where rioters attack

a house, it must appear to be their intention to destroy or demolish the house altogether, to bring them within this statute, as beginning to demolish, &c. Where it appeared that the prisoners and others, in the night time, riotously broke into the prosecutor's house, broke some of the furniture and all the windows, and then went away, it appearing that there was nothing to prevent the rioters from doing further damage if they thought fit: *Littledale, J.*, held that this was not a beginning to demolish, within the meaning of the Act; to bring a case within the Act, it must appear that the rioters intended to demolish the house, and not to injure it merely. *R. v. Thomas*, 4 *Car. & P.* 237. So, where, in an election riot, the rioters, who were of the yellow party, attacked a public-house frequented by the opposite party, entered it by force, many of them crying out to the landlord "turn out the bloody blues or we will have the house down;" they destroyed every moveable thing they could find, glass, plates, chairs, &c., and some fixtures, windows, window frames, &c., and they wrenched away the iron bars from one window, and with them some of the surrounding brick work; on a cry being raised that the police were coming, they quitted the premises; but one of the witnesses, the landlord's daughter, said that they seemed to have done all they wanted to do, and were going away at that time, she did not suppose that they were going to pull down the very walls of the house: *Coleridge, J.*, told the jury that an intention to injure merely, would not bring a case within the Act, nothing short of an intent to leave the house no house at all in fact; if they intended to leave it still a house, however dilapidated, they were not guilty; the jury accordingly acquitted them. *R. v. Adams et al.*, *Car. & M.* 299. So, where a mob attacked a man against whom they had some animosity, and he escaped into a public-house, which was immediately closed against the mob; the mob insisted on the man being given up to them, saying that otherwise they would pull the house down; and the man not being given up, they attacked the house with sticks and stones, beat in the door and lower windows, and entered the house; but not finding the man there, and hearing that the mayor was coming, they went away: *Tindal, C. J.*, held that this was not a beginning to demolish, within the meaning of this Act, the intention of the mob being evidently not to destroy the house, but to get the man into their power. *R. v. Price et al.*, 5 *Car. & P.* 510. But where, in such a case, the mob remained after the obnoxious individual had escaped, and continued to attack the house, until the police interfered and compelled them to desist: *Gurney, B.*, left it to the jury to say whether they had not the intention to demolish the house, as well as to injure the person whom they sought; and the jury being of that opinion, found the prisoners guilty. *R. v.*

496 *Destroying a Dwelling-house by Gunpowder, &c.*

Batt et al., 6 Car. & P. 329. Where, however, a man demolished a cottage which he believed to be his own, and he was assisted in it by others, and it was done in a riotous way : this was holden by Patteson, J., not to be a case within the meaning of the statute. *R. v. Langford et al.*, Car. & M. 602.

It is necessary to remark, that destroying a house by fire, if done by several, in a riotous way, is a demolition of it within the meaning of this statute, and the offenders may be indicted accordingly : it is not necessary they should be prosecuted for arson. *R. v. Harris et al.*, Car. & M. 661. *R. v. Christian et al.*, 12 Law J. 26 m.

3. That the prisoners were either active in pulling down the house, or present and forming a part of the riotous assembly. And where the house was destroyed by fire, it was holden that a person present and aiding whilst it was burning, but not when it was first set fire to, might be convicted. *R. v. Simpson et al.*, Car. & M. 669.

Destroying a Dwelling-house by Gunpowder, &c.

Indictment.

— } The jurors for our Lady the Queen, upon their
to wit. } oath present, that A. B., on the — day of —,
in the year of our Lord —, unlawfully, maliciously, and
feloniously, did put and place a large quantity, to wit, —
pounds weight of gunpowder [*“gunpowder or other explosive
substance”*] near unto [*or state where*] the dwelling-house
of C. D., situate in the parish of —, in the county of —,
and did then unlawfully, maliciously, and feloniously, cause
the said gunpowder to explode, and by the said explosion of
the said gunpowder, he the said A. B. did then unlawfully,
maliciously, and feloniously destroy, throw down, and damage,
the said dwelling-house [*or a part of the said dwelling-house,
to wit, the — of the same*], the said C. D. being in the said
dwelling-house at the time the said A. B. so committed the
said offence, as aforesaid : against the form of the statute in
such case made and provided, and against the peace of our
Lady the Queen, her crown and dignity. [*There is a similar
offence created by the second section of the same statute, an
indictment for which can readily be framed from the above
form. The offences created by the fourth section, have been
already treated of, ante, pp. 278—281.*]

Felony ; 8 & 9 Vict. c. 25, s. 1 ; *transportation for life, or
not less than fifteen years ;—or imprisonment [with or with-*

Destroying a Dwelling-house by Gunpowder, &c. 497

out hard labour, Id. s. 11] for not more than three years ; Id. s. 5 ; and if a male, under eighteen, he may be publicly or privately whipped not more than three times. Id. s. 9. Accessories before the fact, punishable in the same manner ; accessories after the fact, by imprisonment, &c., for not more than two years. Id. s. 10.

This offence is not triable at any sessions of the peace. Id. s. 15.

Evidence.

To maintain this indictment the prosecutor must prove—

1. That the defendant placed the gunpowder or other explosive substance in the situation mentioned in the indictment. This may either be proved by direct evidence, or presumed from the nature of the explosion, the traces appearing after it, showing where and how the explosive substance was placed ; and the defendant's having placed it there, made out by evidence as in other cases. It is necessary however to state, that the statute makes no mention of putting or placing the gunpowder ; it is stated in the indictment merely for the purpose of describing the offence with greater certainty. So that if the prosecutor should fail in the proof of it, it will not be material, but that part of the statement may be rejected as surplusage.

2. The explosion and effect of it. That the defendant caused the gunpowder to explode, may fairly be inferred from his having placed the gunpowder in the place mentioned ; or his having placed it there, may be inferred from the fact of his exploding it, if that be proved.

If the explosion did not in fact take place, but the explosive substance were merely placed or thrown near the building, with intent to destroy or damage it, the statute makes that a substantive felony, punishable with transportation for not more than fifteen years, or imprisonment not exceeding two years. 8 & 9 Vict. c. 25, s. 6.

3. That the house injured, was a dwelling-house, as in burglary, *ante*, p. 333 ; that it was the dwelling-house of C. D. ; *see ante*, p. 336 ; and situated as described in the indictment. *See ante*, p. 339.

4. That C. D. was in the dwelling-house at the time, as *ante*, p. 490.

2. Malicious Injuries to Manufactures, Machinery, &c.

Destroying, Silk, Woollen, Linen, or Cotton Goods in the Loom, &c.

Indictment.

— } The jurors for our Lady the Queen, upon their
to wit. } oath present, that A. B., on the — day of —,
in the year of our Lord —, unlawfully, maliciously, and
feloniously, did cut, break, and destroy, [*“cut, break, or
destroy, or damage with intent to destroy or render use-
less”*] twenty-five yards of woollen cloth [*“any goods or
articles of silk, woollen, linen, or cotton, or of any one or
more of those materials mixed with each other, or mixed
with any other material,—or any framework-knitted pieces,
stocking, hose, or lace,”*] of the goods and chattels of C. D.,
then being in a certain loom [*“in the loom or frame, or on
any machine or engine, or on the rack or tenters, or in any
stage, process, or progress of manufacture”*]: against the
form of the statute in such case made and provided, and
against the peace of our Lady the Queen, her crown and
dignity.

*Felony; transportation for life, or not less than seven
years;—or imprisonment [with or without hard labour,
s. 27] for not more than four years, and if a male, to be once,
twice, or thrice, publicly or privately whipped, if the court
think fit. 7 & 8 G. 4, c. 30, s. 3.*

Evidence.

To maintain this indictment, the prosecutor must prove—

1. That the prisoner cut, broke, or destroyed, &c., the goods mentioned in the indictment, or some part of them, and that they were the property, absolute or special, of C. D. The value is immaterial.

2. That it was done maliciously. But if it be proved that the defendant wilfully did it, the jury may thence presume that he did it maliciously, unless the contrary be shown on the part of the prisoner. It is not necessary in this case, or in any other case under this statute, to prove the offence to have been committed out of malice to the prosecutor; for by sect. 25, the punishments imposed by this statute for offences, “shall equally apply and be enforced, whether the offence

***Destroying Warps of Silk, or Machinery.* 409**

shall be committed from malice conceived against the owner of the property in respect of which it shall be committed, or otherwise."

3. That the goods were at the time in a loom, or in other process of manufacture, as stated in the indictment. And they are considered to be under the protection of the statute, until they are completely finished for sale. *R. v. Woodhead*, 1 Mo. & R. 549.

4. If the offence charged, be a damaging of the goods with intent to destroy them, the intent must be proved from circumstances, if it cannot be implied from the act done.

Breaking or Destroying Warps of Silk, Cotton, &c., or certain Machinery.

Indictment.

— } The jurors for our Lady the Queen, upon their
to wit. } oath present, that A. B., on the — day of —,
in the year of our Lord —, unlawfully, maliciously, and
feloniously did cut, break, and destroy ["*cut, break, or de-
stroy, or damage with intent to destroy or render useless*"]
a certain warp of silk ["*any warp or shute of silk, woollen,
linen, or cotton, or of any one or more of those materials
mixed with each other, or mixed with any other material,—
or any loom, frame, machine, engine, rack, tackle, or imple-
ment (whether fixed or movable) prepared for or employed
in carding, spinning, throwing, weaving, fulling, shearing,
or otherwise manufacturing or preparing any such goods or
articles*"] of the goods and chattels of C. D.: against the
form of the statute in such case made and provided, and
against the peace of our Lady the Queen, her crown and
dignity.

*Felony; transportation for life, or not less than seven
years; or imprisonment [with or without hard labour, s. 27]
for not more than four years, and if a male, to be once,
twice, or thrice publicly or privately whipped, if the court
think fit. 7 & 8 G. 4, c. 30, s. 3.*

Evidence.

To maintain this indictment, the prosecutor must prove—

1. That the prisoner cut, broke, or destroyed, &c., the warp of silk mentioned in the indictment, and that it was the pro-

500 *Entering Buildings by Force, with intent, &c.*

party, absolute or special, of C. D. The value is immaterial. As to the damaging of machinery, &c.,—where the prisoner and others unfastened and took away a certain part of a stocking frame called the half jack, without which the frame could not be worked: the judges held this to be a damaging of the frame, although the parties did no injury to the half jack, nor to the frame itself, otherwise than by separating the half jack from it, and replacing the latter would again make the frame perfect. *R. v. Tacey, R. & Ry.* 452. And the machinery broke or damaged, must be proved to be employed in carding, spinning, weaving, &c.; but these words “employed in carding,” &c., are applicable only to the machinery mentioned in the Act, and do not override the previous words, “warp or shute,” &c. *R. v. Ashton, 1 B. & Ad.* 750.

2. That it was done maliciously, as in the last case.

3. If the offence charged, be the damaging of the warp, &c., with intent to destroy it or render it useless, the intent must be proved from circumstances, if it cannot be implied from the act done.

Entering a Building by Force, with intent to Commit either of the two last-mentioned Offences.

Indictment.

— } The jurors for our Lady the Queen, upon their
to wit. } oath present, that A. B., on the — day of —,
in the year of our Lord —, feloniously did by force enter
a certain house and building [*“house, shop, building, or
place”*] of C. D., in the parish of —, in the county of —,
with intent then and there [unlawfully, maliciously, and
feloniously to cut, break, and destroy twenty-five yards of
woollen cloth, of the goods and chattels of C. D., then being
in a certain loom there,—*describing the offence intended, in
the same manner as in one or other of the last two forms*]:
against the form of the statute in such case made and provided,
and against the peace of our Lady the Queen, her crown and
dignity.

*Felony; transportation for life, or not less than seven
years;—or imprisonment [with or without hard labour,
s. 27] for not more than four years, and if a male, to be once,
twice, or thrice publicly or privately whipped, if the court
think fit. 7 & 8 G. 4, c. 30, s. 3.*

Evidence.

To maintain this indictment, the prosecutor must prove—

1. That the prisoner entered the building mentioned in the indictment, with force ; and that the building at the time was in the occupation of C. D. ; and situate as described.

2. Circumstances from which the jury may infer that he entered it, with the intent charged in the indictment. *See the evidence in the last two cases.*

Destroying Machines in other Manufactures, Threshing Machines, &c.

Indictment.

— } The jurors for our Lady the Queen, upon their
to wit. } oath present, that A. B., on the — day of —,
in the year of our Lord —, unlawfully, maliciously, and
feloniously did cut, break, and destroy [*“cut, break, or de-
stroy, or damage with intent to destroy or render useless”*]
a certain threshing machine [*or a certain machine employed
in the manufacture of — “any threshing machine, or any
machine or engine, prepared for or employed in any manu-
facture whatsoever, except the manufacture of silk, woollen,
linen, or cotton goods, or goods of any one or more of those
materials mixed with each other or mixed with any other
material, or any frame work-knitted piece, stocking, hose,
or lace”*], the property of C. D. : against the form of the
statute in such case made and provided, and against the peace
of our Lady the Queen, her crown and dignity.

*Felony ; transportation for seven years ;—or imprison-
ment [with or without hard labour, s. 27] for not more than
two years, and if a male, to be once, twice, or thrice pub-
licly or privately whipped, if the court think fit. 7 & 8 G. 4,
c. 30, s. 4.*

Evidence.

To maintain this indictment, the prosecutor must prove—

1. That the prisoner cut, broke, or destroyed the machine described in the indictment, and that it was, at the time, the property, absolute or special, of C. D. Where it appeared that the prosecutor, fearing that a mob would come to his

farm to destroy his threshing machine, had it taken to pieces, and the mob afterwards came and destroyed the several pieces of it: Park, J., held the offence to be complete, within the meaning of the statute, and said that the point had already been so decided. *R. v. Mackerel*, 4 Car. & P. 448. And where a threshing machine was worked by a water-wheel, which was used for that purpose only, and the owner, fearing that the mob would destroy his threshing machine, took it down, leaving only the water-wheel standing, which was afterwards broken by the prisoners and others: being indicted for breaking and damaging the machine, Park, J., and Bolland, B., held, that as this water-wheel was part of the machine, proof of these facts was sufficient to maintain the indictment. *R. v. Fidler et al.*, 4 Car. & P. 449. See also *Tacey's case*, ante, p. 500.

2. That it was done maliciously. If it be proved that the prisoner wilfully did it, the jury may thence presume that he did it maliciously. Where it appeared that a mob came to a farm, and broke a threshing machine, that the prisoner was one of the mob, and that he gave the threshing machine a blow with a sledge hammer: Paterson, J., allowed the prisoner's counsel to ask the witnesses for the prosecution, in cross-examination, whether the mob had not compelled several persons to join them, and whether they had not compelled each person to give one blow to every machine they broke; he also allowed the prisoner's witnesses to prove, not only that he had been forced by the mob to join them, but that he and another had resolved to escape from the mob on the first opportunity. *R. v. Crutchley*, 5 Car. & P. 133. See ante, p. 10.

3. If the offence charged be a damaging of the machine, with intent to destroy it or render it useless, the intent must be proved from circumstances, if it cannot sufficiently be implied from the act done.

3. *Malicious Injuries to Farm produce, Trees, &c.*

Setting fire to Crops of Corn, Plantations, &c.

Indictment.

— } The jurors for our Lady the Queen, upon their
to wit. } oath present, that A. B., on the — day of —,
in the year of our Lord —, unlawfully, maliciously, and
feloniously did set fire to a crop of wheat, to wit, five acres of

wheat, [*“corn, grain, or pulse, whether standing or cut down,—or any part of a wood, coppice, or plantation of trees,—or any heath, gorze, furze, or fern, wheresoever the same may be growing”*] the property of C. D., then standing and growing in the parish of —, in the county of —: against the form of the statute in such case made and provided, and against the peace of our Lady the Queen, her crown and dignity.

Felony; transportation for seven years;—or imprisonment, [with or without hard labour, s. 27] for not more than two years, and if a male, to be once, twice, or thrice publicly or privately whipped, if the court shall think fit. 7 & 8 G. 4, c. 30, s. 17.

Evidence.

To maintain this indictment, the prosecutor must prove—

That the prisoner set fire to the wheat in question, and that it was the property of C. D. And if it be proved that he did it wilfully, the jury may fairly presume that he did it maliciously. If the crop were standing when set fire to, it should seem that the local situation of it must be stated and proved; but if cut down, it is otherwise.

Setting fire to Stacks of Corn, Peat, Wood, &c.

Indictment.

— } The jurors for our Lady the Queen, upon their
to wit. } oath present, that A. B., on the — day of —,
in the year of our Lord —, unlawfully, maliciously, and
feloniously did set fire to a certain stack of wheat [*“stack of
corn, grain, pulse, tares, straw, haulm, stubble, furze,
heath, fern, hay, turf, peat, coals, charcoal, or wood, or
any steer of wood”*] of the goods and chattels of C. D.:
against the form of the statute in such case made and provided,
and against the peace of our Lady the Queen, her crown and
dignity. [*It is not necessary to mention the parish, &c.,
where the stack was. R. v. Woodward, Ry. & M. 323.
Where the indictment charged the offence to have been com-
mitted “feloniously, voluntarily, and maliciously,” omitting
“unlawfully,” it was holden bad. R. v. Turner and Reader,
Ry. & M. 239. Where it was objected to an indictment,
that it charged the prisoner with setting fire to a stack of
“barley,” corn and grain being the words in the statute,
Patteson, J., held it to be correct; R. v. Swatkins, 4 Car.*

& P. 548 ; and it should seem that if it had stated it to be "corn" or "grain," it would have been bad for want of certainty.

Felony ; transportation for life, or not less than fifteen years ;—or imprisonment, [with or without hard labour, and solitary for not more than a month at a time, or three months in a year, s. 12] for not more than three years. 1 Vict. c. 89, s. 10. Accessories before the fact, the same punishment ; accessories after the fact, imprisonment, &c., for not more than two years. Id. s. 11.

An attempt to commit this offence, is made felony, and punishable with transportation for not more than fifteen years, or imprisonment, [with or without hard labour, &c., s. 11] for not more than two years. 8 & 9 Vict. c. 29, s. 7.

Evidence.

To maintain this indictment, the prosecutor must prove—That the prisoner set fire to the stack of wheat, as mentioned in the indictment, and that it was then the property of C. D. Where the prisoner was indicted for setting fire to a stack of straw, and it appeared that the stack was partly of straw, partly of haulm or stubble, Parke, J., reserved for the opinion of the judges, whether this was a stack of straw, within the meaning of the Act : but the judges gave no opinion upon it, the case being decided upon a defect in the indictment, as above mentioned. *R. v. Turner and Reader*, Ry. & M. 239. Where the indictment was for setting fire to a stack of beans, the judges held that beans were a species of pulse, and therefore within the statute. *R. v. Woodward*, Ry. & M. 323. Where the indictment charged the prisoner with setting fire to a stack of wood, and it appeared that the wood set fire to, consisted of a score of faggots, heaped one on the other, in a kind of temporary loft over a gateway : Park, J., held that this was not a stack of wood within the meaning of the Act. *R. v. Aris*, 6 Car. & P. 348. In *R. v. Turner and Reader*, above mentioned, it appeared that the prisoners, in setting fire to a haulm stack, had set fire also to two barns adjoining to it, where there was a quantity of straw and oats ; and Parke, J., left it to the jury to say, whether in setting fire to the haulm stack, the defendants did not intend also to set fire to the barns. It is not necessary that the stack should be burnt or destroyed ; if set fire to, it is sufficient. *R. v. Salmon*, R. & Ry. 26. The place where the stack was situate need not be mentioned ; or if mentioned, need not be proved as laid. *R. v. Woodward*, *supra*.

If it appear that the prisoner set fire to it purposely, this will be sufficient *prima facie* evidence of his having done it

maliciously. Where a man was indicted for setting fire to a stack of straw, and it appeared that it had been set on fire by the prisoner's having fired a gun very near to it; the prosecutor having proved this, proposed to prove that the stack had also been set fire to the day before, and that the prisoner was seen at the same time very near it with his gun: this was objected to as being evidence of another felony; but Maule, J., held it to be admissible; he said that although it might be proof of another felony, that circumstance did not render it inadmissible, if the evidence were otherwise receivable. *R. v. Dessett*, 2 Car. & K. 306.

If the evidence only proves an attempt to set fire to the stack, the defendant may be found guilty of the attempt upon this indictment, 14 & 15 Vict. c. 100, s. 9, *ante*, p. 124, and be punished as mentioned, *ante*, p. 504.

Destroying Hop-binds.

Indictment.

— } The jurors for our Lady the Queen, upon their
to wit. } oath present, that A. B., on the — day of —,
in the year of our Lord —, unlawfully, maliciously, and
feloniously did cut and destroy one thousand hop-binds, the
property of C. D., then growing on poles in a certain planta-
tion of hops of the said C. D., situate in the parish of —, in
the county of —: against the form of the statute in such
case made and provided, and against the peace of our Lady
the Queen, her crown and dignity.

*Felony; 7 & 8 G. 4, c. 30, s. 18; transportation for not
more than fifteen years, or less than ten;—or imprisonment,
[with or without hard labour, and solitary for not more
than one month at a time, or three months in a year, s. 3]
for not more than three years. 1 Vict. c. 90, s. 2.*

Evidence.

To maintain this indictment, the prosecutor must prove—

1. That the prisoner cut or destroyed the hop-binds in question, or part of them; and that they were at the time growing on poles in the plantation described in the indictment. The act itself, if wilful, will be *prima facie* evidence of malice.

2. That the plantation was then in the possession or occupation of C. D., and that it is situate as described in the in-

866 *Destroying or Damaging Trees, &c.*

dictment. If there be any variance in this respect between the indictment and proof, the indictment may be amended. *See* 14 & 15 Vict. c. 100, s. 1. *Ante*, p. 100.

Destroying or Damaging Trees, Shrubs, &c.

Indictment.

— } The jurors for our Lady the Queen, upon their
to wit. } oath present, that A. B., on the — day of —,
in the year of our Lord —, unlawfully, maliciously, and
feloniously did cut, root up, and destroy [*“cut, break, bark,
root up, or otherwise destroy or damage”*] a certain oak tree
of C. D., [*“the whole or any part of any tree, sapling, or
shrub, or any underwood”*] then growing in a certain pleasure
ground of the said C. D., [*“park, pleasure ground, garden,
orchard, or avenue, or any ground adjoining or belonging to
any dwelling-house,”*] situate in the parish of —, in the
county of —; thereby doing injury to the said C. D., to an
amount exceeding the sum of one pound: against the form of
the statute in such case made and provided, and against the
peace of our Lady the Queen, her crown and dignity. [*As to
cutting or rooting up a tree, &c., with intent to steal it, see
ante*, p. 413.

*Felony; transportation for seven years;—or imprison-
ment, [with or without hard labour, s. 27] for not more than
two years, and if a male, to be once, twice, or thrice publicly
or privately whipped, if the court think fit. 7 & 8 G. 4,
c. 30, s. 19.*

*The same punishment, if the tree, &c., be growing else-
where, and the amount of injury done exceed the sum of five
pounds. Id.*

Evidence.

To maintain this indictment, the prosecutor must prove—

1. The cutting, rooting up, or destroying of the tree in question, as stated in the indictment. Upon an indictment on stat. 9 G. 1, c. 22, s. 1, which was similar to this, it appeared that the trees there cut down, were not thereby actually destroyed, but might be again grafted on other stocks, and it was objected that from the words in the statute “or otherwise destroy,” the cutting must be such as to destroy the tree, to be within the meaning of the Act: but the judges held that the cutting down of the trees, without the total destruction of them, was an offence within the meaning of the statute. *R. v.*

Taylor, R. & Ry. 373. Where the indictment described the trees as pear trees, and from the evidence they appeared to be grafted seedlings, about seven feet high, intended for sale: it was objected that these were only plants, and the subject of a summary conviction under another section of the statute; but Parke, J., held that they were properly described as trees. *R. v. Hodges, Moody & M. 341.*

2. That it was done maliciously. If proved to have been done wilfully, the jury may fairly presume that it was done maliciously. As in some cases, however, it may be doubtful whether the prisoner did not cut and root up the trees with intent to steal them, it may be advisable in such cases to add a count on stat. 7 & 8 G. 4, c. 29, s. 38, as *ante*, p. 413.

3. That the tree at the time was growing in a pleasure-ground of C. D., in the parish &c. The words in the Act are "park, pleasure-ground, garden, orchard, or avenue, or any ground adjoining or belonging to any dwelling-house." Where the tree was described as growing in ground adjoining to a dwelling-house, and it appeared that the ground was separated from the house by a narrow paved entry and a paling: Parke, J., held that the evidence did not maintain the indictment; ground, to be adjoining to a dwelling-house, must be immediately contiguous to it, without any thing intervening; but he left it to the jury to say whether it was not a garden. *R. v. Hodges, supra.*

4. That the damage done exceeded in amount the sum of one pound. If the tree were growing elsewhere than in a park, pleasure-ground, &c., the injury done must be laid and proved to exceed five pounds. 7 & 8 G. 4, c. 30, s. 19.

4. Malicious Injuries to Mines.

Setting fire to a Coal Mine.

Indictment.

— } The jurors for our Lady the Queen upon their
to wit. } oath present, that A. B., on the — day of —,
in the year of our Lord —, unlawfully, maliciously, and
feloniously did set fire to a certain mine of coal [*"mine of
coal or cannel coal"*] of C. D., situate in the parish of —,
in the county of —: against the form of the statute in such
case made and provided, and against the peace of our Lady
the Queen, her crown and dignity.

Felony ; transportation for life, or not less than fifteen years;—or imprisonment, [with or without hard labour, and solitary for not more than one month at a time, or three months in a year, s. 12], for not more than three years. 1 Vict. c. 89, s. 9.

An attempt to commit this offence, is made felony, and punishable with transportation for not more than fifteen years;—or imprisonment, [with or without hard labour, s. 11], for not more than two years. 8 & 9 Vict. c. 25, s. 7.

Evidence.

To maintain this indictment, the prosecutor must prove—

1. That the prisoner set fire to the mine in question ; *see ante*, p. 486 ; and that the mine at the time was in the occupation of C. D., and situated as described in the indictment.

2. That the prisoner did it maliciously. But if it be proved that he did it wilfully, the jury may from that fairly presume malice.

If the prosecutor fail in proving the offence, but prove an attempt to commit it, the defendant may be found guilty of the attempt, on this indictment, (14 & 15 Vict. c. 100, s. 9, *ante*, p. 124,) and be punished in manner above mentioned.

Drowning a Mine.

Indictment.

— } The jurors for our Lady the Queen, upon their
to wit. } oath present, that A. B., on the — day of —,
in the year of our Lord —, unlawfully, maliciously, and
feloniously did cause a large quantity of water to be conveyed
into a certain mine [*“any mine, or any subterraneous pas-
sage communicating therewith”*] of C. D., situate in the
parish of —, in the county of —, with intent thereby
then to damage the said mine, and to hinder and delay the
working thereof [*“with intent thereby to destroy or damage
such mine, or to hinder or delay the working thereof”*]:
against the form of the statute in such case made and pro-
vided, and against the peace of our Lady the Queen, her crown
and dignity.

*Felony ; transportation for seven years ; or imprison-
ment, [with or without hard labour, s. 27], for not more
than two years, and if a male, to be once, twice, or thrice
publicly or privately whipped, if the court think fit. 7 & 8
G. 4, c. 30, s. 6.*

Evidence.

To maintain this indictment, the prosecutor must prove—

1. That the prisoner caused the water to be conveyed into the mine, in the parish, &c., as stated in the indictment; and that the mine was then in the possession of C. D. *See R. v. Jones*, 1 Car. & K. 181. But if there be any variance between the indictment and proof, in the name of the owner or occupier, the indictment may be amended in that respect.

2. The intent, either to damage the mine, or to hinder or delay the working of it. And if the natural effect of the act done, would be to damage the mine, or to hinder or delay the working of it, the jury may fairly presume that the act was done with that intent, unless the contrary be shown on the part of the prisoner. Proof that it was wilfully done, is sufficient proof of malice.

It is provided, however, by the statute, (7 & 8 G. 4, c. 30, s. 6), that it shall not extend “to any damage committed under ground, by any owner of any adjoining mine, in working the same, or by any person duly employed in such working.”

Filling up or obstructing Airways or Shafts, &c., of Mines.

Indictment.

— } The jurors for our Lady the Queen, upon their
to wit. } oath present, that A. B., on the — day of —,
in the year of our Lord —, unlawfully, maliciously, and
feloniously did fill up and obstruct [“*pull down, fill up, or
obstruct*”] a certain airway [“*any airway, waterway,
drain, pit, level, or shaft*”] of and belonging to a certain
mine of C. D., situate in the parish of —, in the county
of —; with intent thereby to damage the said mine and to
hinder and delay the working thereof, [*the same intent as in
the last case*]: against the form of the statute in such case
made and provided, and against the peace of our Lady the
Queen, her crown and dignity.

*Felony; transportation for seven years; or imprisonment
[with or without hard labour, s. 27], for not more than two
years, and if a male, to be once, twice, or thrice publicly
or privately whipped, if the court think fit. 7 & 8 G. 4,
c. 30, s. 6.*

Evidence.

To maintain this indictment, the prosecutor must prove—

1. That the plaintiff filled up the airway, &c., as stated. The statute, (7 & 8 G. 4, c. 50, s. 6), however, contains a proviso, that it shall not extend “to any damage committed under ground by any owner of any adjoining mine in working the same, or by any person duly employed in such working.” Where the occupiers of adjoining mines had a dispute respecting them, and one of them, in order to assert his right, ordered his men to build a wall across an airway, which would have the effect of driving back the choke damp upon the other’s mine, and prevent the working of it: the workmen being indicted for obstructing the airway, *Ld. Abinger, C. B.*, held that if they *bonâ fide* believed that in obeying their master they were only exercising a right which he possessed, they could not be convicted; but if they knew he had no such right, it would be otherwise. *R. v. James, 8 Car. & P. 131.*

2. That the mine was then in the occupation of C. D., as *ante*, p. 509: and is situate as described in the indictment.

3. The intent either to damage the mine, or to hinder or delay the working of it, as in the last case.

Damaging the Steam Engines, Staiths, Waggon-ways, &c. of Mines.

Indictment.

— } The jurors for our Lady the Queen, upon their
to wit } oath present, that A. B., on the — day of —,
in the year of our Lord —, unlawfully, maliciously, and
feloniously did pull down and destroy [“*pull down or destroy,
or damage with intent to destroy or render useless*”] a cer-
tain steam engine of C. D., for sinking, draining, and working
a certain mine of the said C. D. [“*any steam engine or
other engine for sinking, draining, or working any mine,—
or any staith, building, or erection used in conducting the
business of any mine,—or any bridge or waggon-way, or
trunk for conveying minerals from any mine,—whether
completed or in an unfinished state*”] situate in the parish
of —, in the county of —: against the form of the statute
in such case made and provided, and against the peace of our
Lady the Queen, her crown and dignity.

: *Felony; transportation for seven years,—or imprisonment, [with or without hard labour, s. 27], for not more than two years, and if a male, to be once, twice, or thrice publicly or privately whipped, if the court think fit. 7 & 8 G. 4, c. 30, ss. 7, 6.*

Evidence.

To maintain this indictment, the prosecutor must prove—

1. That the prisoner pulled down or destroyed the engine, as stated; and that the engine was, at the time, used or erected for the purpose mentioned in the indictment. It is immaterial whether it was completed or in an unfinished state, at the time. 7 & 8 G. 4, c. 30, s. 7. Where a man was indicted for damaging a steam engine belonging to a coal mine with intent to render it useless, it appeared that he entered the engine-house (which was locked) at night, and set the engine going, which, being at the time disconnected with the machinery by which the coals were brought up from the mine, worked with extraordinary velocity, so as to put several parts of the machinery out of gear, and would have created serious damage if it had not been timely discovered, and the engine stopped: Gurney, B., left it to the jury to say, whether the intent of the prisoner was either to destroy the engine or to render it useless, for if so the case was within the statute. *R. v. Norris*, 9 Car. & P. 241. But where upon such an indictment for damaging a steam engine, it appeared that it was not the engine itself which was damaged, but a cylinder called a drum, worked by the engine, and round which revolved the rope which brought the coals to the pit's mouth: it was holden that as the drum was no part of the engine, the offence stated was not proved. *R. v. Whittingham*, 9 Car. & P. 234. In this last case, upon another count for damaging an "erection" used for conducting the business of the mine, it appeared that the pit at the bottom was flooded, but at some distance higher up the shaft there was a seam of coal, and for the purpose of working it, the prosecutor had erected a scaffolding at the level across the shaft; and that the prisoner, knowing this, had thrown a corve (a small waggon) down the shaft, and thereby greatly injured the scaffold: Patterson, J., held that the scaffold was an erection within the meaning of the statute. *Id.*

2. That the mine at the time was in the possession or occupation of C. D., as *ante*, p. 508; and situate as described in the indictment.

512 *Breaking down Sea or River Banks.*

3 That the prisoner committed the offence maliciously : but if he did it wilfully, the jury may fairly presume malice from that circumstance.

4. If the offence charged, be a damaging of the engine, &c., with intent to destroy it or render it useless, the intent must be proved from circumstances if it cannot be sufficiently implied from the act done. *See the cases above cited.*

5. *Malicious Injuries to Rivers, Canals, Ponds, Bridges, Turnpike Gates, &c.*

Breaking down Sea or River Banks, and overflowing Lands.

Indictment.

— } The jurors for our Lady the Queen, upon their
to wit. } oath present, that A. B., on the — day of —,
in the year of our Lord —, unlawfully, maliciously, and
feloniously, did break down and cut down [*“break down or
cut down”*] a certain part of the bank of a canal [*“any sea-
bank, or sea-wall,—or the bank or wall of any river, canal,
or marsh”*] called —, in the parish of —, in the county
of —; by means whereof certain lands there were then [in
danger of being] overflowed and damaged: against the form
of the statute in such case made and provided, and against
the peace of our Lady the Queen, her crown and dignity.

*Felony; transportation for life, or not less than seven
years;—or imprisonment [with or without hard labour, s.
27] for not more than four years, and if a male, to be once,
twice, or thrice publicly or privately whipped, if the court
think fit. 7 & 8 G. 4, c. 30, s. 12.*

Evidence.

To maintain this indictment, the prosecutor must prove—

1. That the defendant cut or broke down the part of the canal bank mentioned in the indictment; and the parish and county in which it was situate. And if it be proved to have been done wilfully, the jury may fairly presume it to have been done maliciously.

. Destroying Locks, Sluices, &c. of Canals, &c. 513

- 2. That by means of the cutting or breaking down of the bank, certain lands were overflowed or damaged, or in danger of being so, as stated in the indictment.

Destroying Locks, Sluices, &c., on Navigable Rivers, Canals, &c.

Indictment.

— } The jurors for our Lady the Queen, upon their
to wit. } oath present, that A. B., on the — day of —,
in the year of our Lord —, unlawfully, maliciously, and
feloniously did throw down, level, and destroy [*“ throw down,
level, or otherwise destroy”*] a certain lock of a certain canal
[*“ lock, sluice, floodgate, or other work on any navigable
river or canal”*] called —, in the parish of —, in the
county of — : against the form of the statute in such case
made and provided, and against the peace of our Lady the
Queen, her crown and dignity.

*Felony ; transportation for life, or for not less than seven
years ;—or imprisonment [with or without hard labour,
s. 27] for not more than four years, and if a male, to be once,
twice, or thrice publicly or privately whipped, if the court
shall think fit. 7 & 8 G. 4, c. 30, s. 12.*

Evidence.

To maintain this indictment, the prosecutor must prove—

1. That the defendant threw down, levelled, or destroyed the lock on the canal stated in the indictment, or was present aiding and abetting in doing so ; and that it was situate in the parish and county as described.

2. If the offence be stated as an injury to a navigable river, it must be proved that the river at that particular part is navigable.

Removing Piles, &c., fixed in the ground, for securing River or Sea-banks.

Indictment.

— } The jurors for our Lady the Queen, upon their
to wit. } oath present, that A. B., on the — day of —,
in the year of our Lord —, unlawfully, maliciously, and

314 *Doing Damage to Navigable Rivers or Canals.*

feloniously did draw up and remove [*“cut off, draw up, or remove”*] twenty piles [*“any piles, chalk, or other materials”*] fixed in the ground, and then used for securing the bank of a certain canal [*“any sea-bank or sea-wall,—or the bank or wall of any river, canal, or marsh”*] called —, in the parish of —, in the county of —: against the form of the statute in such case made and provided, and against the peace of our Lady the Queen, her crown and dignity.

Felony ; transportation for seven years ;—or imprisonment [with or without hard labour, s. 27] for not more than two years, and if a male, to be once, twice, or thrice publicly or privately whipped, if the court shall think fit. 7 & 8 G. 4, c. 30, s. 12.

Evidence,

To maintain this indictment, the prosecutor must prove—

1. That the defendant drew up or removed the piles in question, as stated in the indictment, or that he was present aiding and abetting in doing so. And if it be proved to have been done wilfully, the jury may thence presume that it was done maliciously.

2. That the piles were at the time fixed in the ground, within the parish, &c., and used for the purpose of securing the bank of the canal mentioned in the indictment.

Drawing up Flood-gates, or doing other Damage to Navigable Rivers or Canals.

Indictment.

— } The jurors for our Lady the Queen, upon their
to wit. } oath present, that A. B., on the — day of —,
in the year of our Lord —, unlawfully, maliciously, and
feloniously did open and draw up a certain floodgate of and
belonging to a certain navigable river [*“open or draw up any
floodgate, or do any other injury or mischief to any navi-
gable river or canal”*] called —, in the parish of —, in
the county of —; with intent to obstruct and prevent the
carrying on and maintaining the navigation thereof; and by
means thereof the carrying on and maintaining the navigation
of the said river, were then obstructed and prevented: against
the form of the statute in such case made and provided, and
against the peace of our Lady the Queen, her crown and
dignity.

Breaking down the Dam of a Fish-pond. 515.

Felony; transportation for seven years:—or imprisonment [with or without hard labour, s. 27] for not more than two years, and if a male, to be once, twice, or thrice publicly or privately whipped, if the court shall think fit. 7 & 8 G. 4, c. 80, s. 12.

Evidence.

To maintain this indictment, the prosecutor must prove—

1. That the defendant opened or drew up the floodgate in question, or was present aiding and abetting in doing so; and that it was situate as mentioned in the indictment. If it were done wilfully, the jury will be warranted in finding that it was done maliciously.

2. That the floodgate belonged to the river mentioned in the indictment; and that the river was navigable at that particular part of it.

3. Circumstances from which the jury may fairly presume that the prisoner's intent was to obstruct and prevent the carrying on or maintaining the navigation of the river. And if this would have been the natural or probable consequence of the prisoner's act, he may fairly be presumed to have intended it.

4. That in fact the carrying on and maintaining the navigation of the river, were obstructed and prevented by what the prisoner did.

Breaking down the Dam of a Fish-pond.

Indictment.

— } The jurors for our Lady the Queen, upon their
to wit. } oath present, that A. B., on the — day of —,
in the year of our Lord —, unlawfully and maliciously did
break down and destroy [*“break down or otherwise de-
stroy”*] the dam of a certain fish-pond [*“the dam of any
fish-pond, or of any water which shall be private property,
or in which there shall be a private right of fishery”*] of C. D.
situate in the parish of —, in the county of —; with in-
tent thereby then to take and destroy [*“take or destroy”*] the
fish then being in the said pond [*or, and did thereby then
cause the loss and destruction of divers of the fish then being
in the said pond*]: against the form of the statute in such case

made and provided, and against the peace of our Lady the Queen, her crown and dignity.

Misdemeanor ; transportation for seven years ; or imprisonment [with or without hard labour, s. 27] for not more than two years, and if a male, to be once, twice, or thrice publicly or privately whipped, if the court think fit. 7 & 8 G. 4, c. 30, s. 15.

Evidence.

To maintain this indictment, the prosecutor must prove—

1. That the defendant broke down or destroyed the dam of the fish-pond in question, within the parish, &c., and that the pond was the property of C. D. That it was done purposely, will be sufficient evidence of its being done maliciously.

2. Circumstances from which the jury may fairly presume that the defendant intended to take or destroy the fish in the pond ; or the loss or destruction of some of the fish in the pond, by the defendant's act ;—according as it is laid in the indictment.

Putting Lime, &c., into a Fish-pond, &c.

Indictment.

— } The jurors for our Lady the Queen, upon their
to wit. } oath present, that A. B., on the — day of —,
in the year of our Lord —, unlawfully and maliciously did
put a large quantity of lime [*“any lime or other noxious
material”*] into a certain pond [*“pond or water”*] of C. D.,
situate in the parish of —, in the county of —, with in-
tent thereby then to destroy the fish then being in the said
pond : against the form of the statute in such case made
and provided, and against the peace of our Lady the Queen,
her crown and dignity.

Misdemeanor ; transportation for seven years ; or imprisonment [with or without hard labour, s. 27] for not more than two years, and if a male, to be once, twice, or thrice publicly or privately whipped, if the court shall think fit. 7 & 8 G. 4, c. 30, s. 15.

Evidence.

To maintain this indictment, the prosecutor must prove—

Breaking down the Dam of a Mill-pond. 517

1. That the defendant put the lime, &c., into the fish-pond in question, within the parish, &c.; and that the pond was the property, or in the occupation, of C. D. That it was done purposely, will be sufficient *prima facie* evidence of its being done maliciously.

2. Circumstances from which the jury may fairly presume the intent, as laid. That the lime or other noxious substance would naturally have the effect of destroying the fish, will be sufficient *prima facie* evidence that it was put into the pond with that intent.

Breaking down or Destroying the Dam of a Mill-pond.

Indictment.

— } The jurors for our Lady the Queen, upon their
to wit. } oath present, that A. B., on the — day of —,
in the year of our Lord —, unlawfully and maliciously did
break down and destroy [*“break down or otherwise destroy”*]
the dam of a certain mill-pond of C. D., situate in the parish
of —, in the county of —: against the form of the
statute in such case made and provided, and against the peace
of our Lady the Queen, her crown and dignity.

Misdemeanor ; transportation for seven years ;—or imprisonment, [with or without hard labour, s. 27] for not more than two years, and if a male, to be once, twice, or thrice publicly or privately whipped, if the court shall think fit. 7 & 8 G. 4, c. 80, s. 15.

Evidence.

To maintain this indictment, the prosecutor must prove—
That the defendant broke down or destroyed the dam of the mill-pond in question, within the parish, &c.; and that the pond was the property, or in the occupation, of C. D. That it was done purposely, will be sufficient *prima facie* evidence of its being done maliciously.

Destroying or Damaging a Bridge.

Indictment.

— } The jurors for our Lady the Queen, upon their
to wit. } oath present, that A. B., on the — day of —,
in the year of our Lord —, unlawfully, maliciously, and

feloniously did pull down and destroy [*"pull down or in any-wise destroy any public bridge,—or do any injury, with intent and so as thereby to render such bridge or any part thereof dangerous or impassable"*] a certain public bridge, situate in the parish of —, in the county of —: against the form of the statute in such case made and provided, and against the peace of our Lady the Queen, her crown and dignity.

Felony; transportation for life, or not less than seven years;—or imprisonment, [with or without hard labour, s. 27] for not more than four years, and if a male, to be once, twice, or thrice publicly or privately whipped, if the court think fit. 7 & 8 G. 4, c. 30, s. 13.

Evidence.

To maintain this indictment, the prosecutor must prove—That the defendant pulled down or destroyed the bridge in question, within the parish, &c., or that he was present aiding and abetting in doing so. The act itself, if wilful, will be evidence of malice.

Or if the act charged be, that he injured the bridge, with intent and so as thereby to render it dangerous or impassable, the prosecutor must prove the injury as laid, the intent, and that the effect was to render the bridge dangerous or impassable.

Destroying Turnpike-gates, Weighing-machines, &c.

Indictment.

— } The jurors for our Lady the Queen, upon their
to wit. } oath present, that A. B., on the — day of —,
in the year of our Lord —, unlawfully and maliciously did
throw down, level, and destroy [*"throw down, level, or
otherwise destroy, in whole or in part"*] a certain turnpike-
gate [*"any turnpike-gate,—or any wall, chain, rail, post,
bar, or other fence, belonging to any turnpike-gate, or set
up or erected to prevent passengers passing by without pay-
ing any toll directed to be paid by any Act or Acts of
parliament relating thereto,—or any house, building, or
weighing-engine erected for the better collection, ascertain-
ment, or security of any such toll"*] called —, situate in
the parish of —, in the county of —: against the form of
the statute in such case made and provided, and against the
peace of our Lady the Queen, her crown and dignity.

Placing Wood, &c. on Railways, with intent, &c. 519

Misdemeanor ; fine, or imprisonment, or both, as at common law ; 7 & 8 G. 4, c. 30, s. 14 ; the imprisonment to be with or without hard labour. Id. s. 27.

Evidence.

To maintain this indictment, the prosecutor must prove—That the defendant threw down, levelled, or destroyed the turnpike-gate, or other thing stated in the indictment ; and its local situation as described ; and that the prisoner was either active in doing it, or was present aiding and abetting. That it was done purposely, will be sufficient evidence of its being done maliciously.

5. Malicious Injuries, with respect to Railways.

Placing Wood, &c., on Rails, with intent, &c.

Indictment.

—) The jurors for our Lady the Queen, upon their
to wit.) oath present, that A. B., on the — day of —,
in the year of our Lord —, wilfully, maliciously, and feloniously did put, place, cast, and throw a piece of wood upon and across a certain railway, called —, in the parish of —, in the county of —, [*“ put, place, or throw upon or across any railway any wood, stone, or other matter or thing,—or take up, remove, or displace any rail, sleeper, or other matter or thing belonging to any railway,—or turn, move, or divert any points or other machinery belonging to any railway,—or make or show, hide or remove, any signal or light upon or near to any railway,—or do or cause to be done any other matter or thing”*] with intent thereby then to obstruct and injure a certain engine and carriages using the said railway [*“ with intent to obstruct, upset, overthrow, injure, or destroy any engine, tender, carriage, or truck using such railway, or to endanger the safety of any person travelling or being upon such railway”*] : against the form of the statute in such case made and provided, and against the peace of our Lady the Queen, her crown and dignity. [*The intent may be laid in different ways in other counts, if deemed necessary.*

Felony ; transportation for life, or not less than seven years ;—or imprisonment with or without hard labour for not less than three years. 14 & 15 Vict. c. 19, s. 6. Counts as in other cases of felony. Id. s. 14.

520 *Throwing Stones at Carriages or Railways.*

Evidence.

To maintain this indictment, the prosecutor must prove—

1. That the defendant placed or threw the piece of wood, &c., upon or across the railroad; the name of the road, the parish, &c.;—or that he did some of the other acts made punishable by the sixth section of the statute, as above mentioned, as laid in the indictment.

2. The intent as laid, which may be proved by circumstances from which the jury may presume it. If it was done wilfully, and was likely to produce the effect alleged to be intended, this of itself will be good *primâ facie* evidence of the intent.

Throwing a Stone, &c., against or upon a Railway Carriage, &c., with intent, &c.

Indictment.

— } The jurors for our Lady the Queen, upon their
to wit. } oath present, that A. B., on the — day of —,
in the year of our Lord —, wilfully, maliciously, and feloniously did cast and throw [*“cast, throw, or cause to fall or strike”*] a stone [*“any wood, stone, or other matter or thing”*] against and upon a certain carriage [*“engine, tender, carriage, or truck”*] used upon a certain railway, called —, with intent thereby then to endanger the safety of the persons then being in the said carriage [*“any person in or upon such engine, tender, carriage, or truck”*]: against the form of the statute in such case made and provided, and against the peace of our Lady the Queen, her crown and dignity.

Felony; transportation for life, or for not less than seven years;—or imprisonment, with or without hard labour, for not more than three years. 14 & 15 Vict. c. 19, s. 7. Costs as in other cases of felony. Id. s. 14.

Evidence.

To maintain this indictment, the prosecutor must prove—

1. That the defendant cast or threw the stone or other thing against or upon the railway carriage, as stated in the indictment. If it appear that he did it wilfully, the jury may fairly presume that he did it maliciously.

2. The intent as laid. This may in general be presumed from the act itself; or it may be proved by evidence of facts from which the jury may presume it.

Setting fire to Stations or Warehouses, &c.

Indictment.

— } The jurors for our Lady the Queen, upon their
to wit. } oath present, that A. B., on the — day of —,
in the year of our Lord —, wilfully, maliciously, and feloniously did set fire to a certain station [*“station, engine-house, warehouse, or other building”*] in the parish of —, in the county of —, then belonging and appertaining to a certain railway, called —, and the property of the — railway company [*“belonging or appertaining to any railway, dock, canal, or other navigation”*]: against the form of the statute in such case made and provided, and against the peace of our Lady the Queen, her crown and dignity.

Felony; transportation for life, or not less than seven years;—or imprisonment, with or without hard labour, for not more than three years. 14 & 15 Vict. c. 19, s. 8. Costs as in other cases of felony. Id. s. 14.

Setting fire to goods in any such building, &c., transportation for not more than ten, nor less than seven years,—or imprisonment, with or without hard labour, for not more than three years. Id. s. 8.

Evidence.

To maintain this indictment, the prosecutor must prove—

1. That the defendant set fire to the station, as *ante*, p. 486.
2. That it belonged to the railway; and was the property, or in the occupation, of the railway company, mentioned in the indictment; and situated as there described.

7. Malicious Injuries to Works of Art.

Destroying or Damaging anything kept for the purpose of Art or Science in a Museum.

Indictment.

— } The jurors for our Lady the Queen, upon their
to wit. } oath present, that A. B., on the — day of —,
in the year of our Lord —, unlawfully and maliciously did

520 *Throwing Stones at Carriages or Railways.*

Evidence.

To maintain this indictment, the prosecutor must prove—

1. That the defendant placed or threw the piece of wood, &c., upon or across the railroad; the name of the road, the parish, &c.;—or that he did some of the other acts made punishable by the sixth section of the statute, as above mentioned, as laid in the indictment.

2. The intent as laid, which may be proved by circumstances from which the jury may presume it. If it was done wilfully, and was likely to produce the effect alleged to be intended, this of itself will be good *prima facie* evidence of the intent.

Throwing a Stone, &c., against or upon a Railway Carriage, &c., with intent, &c.

Indictment.

— } The jurors for our Lady the Queen, upon their
to wit. } oath present, that A. B., on the — day of —,
in the year of our Lord —, wilfully, maliciously, and feloniously did cast and throw [*“cast, throw, or cause to fall or strike”*] a stone [*“any wood, stone, or other matter or thing”*] against and upon a certain carriage [*“engine, tender, carriage, or truck”*] used upon a certain railway, called —, with intent thereby then to endanger the safety of the persons then being in the said carriage [*“any person in or upon such engine, tender, carriage, or truck”*]: against the form of the statute in such case made and provided, and against the peace of our Lady the Queen, her crown and dignity.

Felony; transportation for life, or for not less than seven years;—or imprisonment, with or without hard labour, for not more than three years. 14 & 15 Vict. c. 19, s. 7. Costs as in other cases of felony. Id. s. 14.

Evidence.

To maintain this indictment, the prosecutor must prove—

1. That the defendant cast or threw the stone or other thing against or upon the railway carriage, as stated in the indictment. If it appear that he did it wilfully, the jury may fairly presume that he did it maliciously.

2. The intent as laid. This may in general be presumed from the act itself; or it may be proved by evidence of facts from which the jury may presume it.

Setting fire to Stations or Warehouses, &c.

Indictment.

— } The jurors for our Lady the Queen, upon their
to wit. } oath present, that A. B., on the — day of —,
in the year of our Lord —, wilfully, maliciously, and feloniously did set fire to a certain station [*“station, engine-house, warehouse, or other building”*] in the parish of —, in the county of —, then belonging and appertaining to a certain railway, called —, and the property of the — railway company [*“belonging or appertaining to any railway, dock, canal, or other navigation”*]: against the form of the statute in such case made and provided, and against the peace of our Lady the Queen, her crown and dignity.

Felony; transportation for life, or not less than seven years;—or imprisonment, with or without hard labour, for not more than three years. 14 & 15 Vict. c. 19, s. 8. Costs as in other cases of felony. Id. s. 14.

Setting fire to goods in any such building, &c., transportation for not more than ten, nor less than seven years,—or imprisonment, with or without hard labour, for not more than three years. Id. s. 8.

Evidence.

To maintain this indictment, the prosecutor must prove—

1. That the defendant set fire to the station, as *ante*, p. 486.
2. That it belonged to the railway; and was the property, or in the occupation, of the railway company, mentioned in the indictment; and situated as there described.

7. Malicious Injuries to Works of Art.

Destroying or Damaging anything kept for the purpose of Art or Science in a Museum.

Indictment.

— } The jurors for our Lady the Queen, upon their
to wit. } oath present, that A. B., on the — day of —,
in the year of our Lord —, unlawfully and maliciously did

522 *Malicious Injuries to Works of Art, &c.*

damage [*“destroy or damage”*] a certain — by then [*stating how*], which said — was then kept for the purposes of art and science and as an object of curiosity [*“art, science, or literature, or as an object of curiosity”*] in a certain museum called —, [*“museum, gallery, cabinet, library, or other repository”*], which museum then was from time to time open for the admission of the public to view the same [*“either at all times or from time to time open for the admission of the public, or of any considerable number of persons, to view the same, either by the permission of the proprietor thereof, or by the payment of money before entering the same”*]: against the form of the statute in such case made and provided, and against the peace of our Lady the Queen, her crown and dignity.

Misdemeanor; imprisonment for not more than six months, and during that time the offender may be put to hard labour, or be once, twice, or thrice privately whipped, as the court shall direct. 8 & 9 Vict. c. 44, s. 1.

Evidence.

To maintain this indictment, the prosecutor must prove—

1. That the defendant damaged the article mentioned in the indictment. And if it be proved that he did it wilfully, it may fairly be presumed that he did it maliciously.

2. That the article was at the time kept in the museum mentioned in the indictment, for the purposes of art or science, or as a matter of curiosity.

3. That the museum was, either at all times, or from time to time, open for the admission of the public, or by permission of the proprietor, or upon payment of money, as stated in the indictment.

Destroying or Damaging any Picture, Statue, or Monument in a Church or in Public.

Indictment.

— } The jurors for our Lady the Queen, upon their
to wit. } oath present, that A. B., on the — day of —,
in the year of our Lord —, unlawfully and maliciously did
damage [*“destroy or damage”*] a certain monument of
C. D., deceased, by [*stating how*], the said monument then
being in the church of —, in the parish of —, in the

Killing or Wounding Cattle or Sheep. 523

County of—, [“any picture, statue, monument, or painted glass in any church or chapel or other place of religious worship,—or any statue or monument exposed to public view”]: against the form of the statute in such case made and provided, and against the peace of our Lady the Queen, her crown and dignity.

Misdemeanor; imprisonment for not more than six months, and during that time the offender may be put to hard labour; or be once, twice, or thrice privately whipped, as the court shall direct. 8 & 9 Vict. c. 44, s. 1.

Evidence.

To maintain this indictment, it must be proved—

1. That the defendant damaged the monument in question, in the manner mentioned in the indictment.

2. That the monument was at the time in the church mentioned in the indictment, and situated as there described.

8. Malicious Injuries to Animals.

Killing or Wounding Cattle or Sheep.

Indictment.

— } The jurors for our Lady the Queen, upon their
to wit. } oath present, that A. B., on the — day of —,
in the year of our Lord —, unlawfully, maliciously, and
feloniously did kill, [“kill, maim, or wound”] a certain
mare, [“any cattle,”] the property of C. D.: against
the form of the statute in such case made and provided, and
against the peace of our Lady the Queen, her crown and
dignity. [It is not sufficient to say that the defendant
killed “certain cattle,” but the species of cattle killed or
wounded must be mentioned. R. v. Chalkley, R. & Ry. 258.
Felony; 7 & 8 G. 4, c. 30, s. 16; transportation for not
more than fifteen years, nor less than ten;—or imprisonment,
[with or without hard labour, and solitary for not more
than a month at a time, or three months in a year, s. 3],
for not more than three years. 1 Vict. c. 90, s. 2.

Evidence.

To maintain this indictment, the prosecutor must prove—

524 *Killing or Wounding Cattle or Sheep.*

1. The killing of the mare by the prisoner, as stated in the indictment. The words in the statute are "kill, maim, or wound." A man is said to kill an animal, when he wilfully does that which causes the death of it. Where, upon an indictment for killing a cow, it appeared that the cow-house, in which the cow was, was set fire to, and the cow was thereby burnt to death: Taunton, J., held that if the prisoner set fire to the cow-house, he was guilty of the offence imputed to him. *R. v. Haughton*, 5 Car. & P. 559. Wounding must be by some instrument; and, therefore, where, upon an indictment for wounding a sheep, it appeared that the prisoner set a dog at the sheep, which bit and wounded it: Park, J., held that this was not a maiming or wounding of the sheep, by the prisoner, within the meaning of the Act. *R. v. Hughes*, 2 Car. & P. 491. And the wound may be either an incised wound by a cutting or stabbing instrument, or a contused wound by a bludgeon, or the like. See *ante*, p. 260. Maiming cattle, within the meaning of this Act, seems to have the same signification as the maiming of a human being, (see *ante*, p. 264), namely, the inflicting an injury upon such part of the animal's body, as may render it less able, in fighting, to defend itself, or to annoy its adversary. Upon an indictment for killing a mare, with a count for wounding, and another for maiming her, it appeared that the prisoner poured nitrous acid into the mare's ear, and some of it either fell or was poured into the eye, which blinded her; she lived in great agony for ten days, when her owner had her killed; the surgeon proved that the injury done to the ear was what is technically called an ulcer, not a wound: the prisoner, however, being convicted, the judges held the conviction to be right, being of opinion that blinding the mare by the means above stated, was a maiming within the meaning of the Act. *R. v. Owens*, Ry. & M. 205. But where a man, being incensed against a horse which had thrown him and dragged him some distance along the ground, caught hold of the horse's tongue, a part of which remained in his hand, which he threw away; it was not known how this was effected, but it was certainly not by means of any instrument; being indicted for this, one count stating it to be a wounding, and another a maiming, it was objected that this was not a wounding, not being effected by any instrument, nor a maiming because it was not a member necessary for the animal's defence; and Wightmen, J., after conferring with Patteson, J., being of this opinion, the prisoner was acquitted. *R. v. Jeans*, 1 Car. & K. 539. To constitute a wounding, however, it is not necessary that the injury should be of a permanent nature; *R. v. Haywood*, R. & Ry. 16; but to constitute a maiming, it must.

As to the cattle within the meaning of the Act:—the words of the Act are "any cattle." This may be deemed to include

the several species of cattle mentioned in stat. 7 & 8 G. 4, c. 29, s. 25, noticed *ante*, p. 398, as to the stealing of cattle,—namely, “horse, mare, gelding, colt, or filly,—bull, cow, ox, heifer, or calf,—ram, ewe, sheep, or lamb.” Asses are also cattle, within the meaning of the Act; *R. v. Whitney*, *Ry. & M.* 9; so are pigs. *R. v. Chapple*, *R. & Ry.* 77.

2. That it was done maliciously. But it is immaterial whether the offence was committed from malice conceived against the owner of the animal, or otherwise. 7 & 8 G. 4, c. 30, s. 25. Where it was proved that the prisoner thrust a knife into the vagina of a mare, and cut her, whilst she was standing quietly in the stable, and it did not appear that he even knew to whom the mare belonged, or had any knowledge of her owner, nor was any evidence given of his motive for committing the offence: upon being indicted for wounding the mare, it was objected that the stat. 1 Vict. c. 90, s. 2, which recited this offence and altered the punishment, had the effect of rendering the twenty-fifth sect. of stat. 7 & 8 G. 4, c. 30, inoperative; but the prisoner being found guilty, and the point being reserved for the opinion of the judges, they held the conviction to be right. *R. v. Tivey*, 1 *Car. & K.* 704. And generally, where the offence is proved to have been committed wilfully, the jury may fairly infer that it was done maliciously.

3. That the mare was at the time the property of C. D.

9. *Malicious Injuries to Ships.*

Setting fire to or Casting away Ships, whereby Life is endangered, &c.

Indictment.

— } The jurors for our Lady the Queen, upon their
to wit. } oath present, that A. B., on the — day of —,
in the year of our Lord —, unlawfully, maliciously, and
feloniously did [upon the high sea] set fire to [“*set fire
to, cast away, or in anywise destroy*”] a certain ship and
vessel [“*any ship or vessel*”] called the —, the property of
C. D. [then being upon the high sea]. with intent thereby then
feloniously and of his malice aforethought to murder several
persons who were then in and on board of the said ship and
vessel, [or whereby the lives of several persons then in and on
board of the said ship and vessel were endangered,—“*with
intent to murder any person, or whereby the life of any*”]

person is endangered"] : against the form of the statute in such case made and provided, and against the peace of our Lady the Queen, her crown and dignity.

Felony; death. 1 Vict. c. 89, s. 4.

Evidence.

To maintain this indictment, the prosecutor must prove—

1. That the prisoner set fire to the ship or vessel in question. *See ante*, p. 486. As to what should be deemed a "vessel," within the meaning of the former Act upon this subject, 7 & 8 G. 4, c. 30, s. 9, has been in some cases doubted. Where it appeared to be a pleasure boat, about eighteen feet long, Patteson, J., inclined to think that it was a vessel within the meaning of the Act; but the prisoner being afterwards acquitted on the merits, it became unnecessary to give any decisive opinion upon the subject. *R. v. Bowyer et al.*, 4 Car. & P. 559. On the other hand, where a prisoner was indicted for setting fire to a barge, Alderson, J., intimated that if the prisoner should be convicted, he would take the opinion of the judges as to whether a barge was a "vessel" within the meaning of the Act; but the prisoner was acquitted. *R. v. Smith*, 4 Car. & P. 569.

If it appear that the prisoner wilfully set fire to the vessel, the jury may fairly presume that he did it maliciously.

2. The ownership of the vessel. Acts of ownership would, it should seem, be sufficient evidence of this. But in general it is well to be prepared to prove the ownership by the regular evidence of it, such as the bill of sale, certificate of registry, &c. *See R. v. Philip*, Ry. & M. 263. If the name of the owner be unknown, the vessel must be described in the indictment as the property "of some person or persons to the jurors aforesaid unknown."

3. The intent to murder,—or the fact of the lives of the persons on board being endangered by the act of the prisoner,—as stated in the indictment.

Setting fire to or Destroying a Ship.

Indictment.

— } The jurors for our Lady the Queen, upon their
to wit. } oath present, that A. B., on the — day of —,
in the year of our Lord —, unlawfully, maliciously, and

feloniously did set fire to [*“set fire to or in any wise destroy,”*] a certain ship and vessel, the property of C. D., the same being then in an unfinished state [*“whether the same be complete or in an unfinished state”*]: against the form of the statute in such case made and provided, and against the peace of our Lady the Queen, her crown and dignity.

Felony; transportation for life, or not less than fifteen years;—or imprisonment [with or without hard labour, and solitary for not more than a month at a time, or three months in a year, s. 12] for not more than three years. 1 Vict. c. 89, s. 6.

An attempt to commit this offence of setting fire to a ship or vessel, where the offence itself is punishable with transportation for life, is now punishable with transportation for not more than fifteen years,—or imprisonment [with or without hard labour, and solitary for not more than one month at a time, or three months in a year, s. 11], for not more than three years. 8 & 9 Vict. c. 25, s. 7.

Evidence.

To maintain this indictment, the prosecutor must prove—

1. The setting fire to the ship by the defendant, and that it was done maliciously, as in the last case.
2. The ownership, as in the last case.
3. And that the ship at the time was in an unfinished state, if such be the fact.

Setting fire to or Casting away a Ship, to Prejudice the Owner or Underwriters.

Indictment.

— } The jurors for our Lady the Queen, upon their
to wit. } oath present, that A. B., on the — day of —,
in the year of our Lord —, unlawfully, maliciously, and
feloniously did [upon the high sea] set fire to [*“set fire to,
cast away, or in anywise destroy”*] a ship and vessel called
the —, the property of C. D., [then being on a certain voy-
age upon the high sea], with intent thereby then to prejudice
[the said C. D. the owner (or a part owner) of the said ship
and vessel as aforesaid,—or one G. H., the owner of certain
goods then laden and being on board of the said ship and
vessel,—or J. K. and L. M., who had before then severally
underwritten a certain policy of insurance on the said ship and
vessel for the said voyage, and on the freight thereof, and on

certain goods in the said policy alleged to be laden on board of the said ship and vessel, and which said policy was then in full force and operation, *or as the case may be*: against the form of the statute in such case made and provided, and against the peace of our Lady the Queen, her crown and dignity. [*You may have several counts, alleging the intent in various ways, as above mentioned, and add a general count as in the last form. As to the venue, see ante, p. 66.*]

Felony; transportation for life, or not less than fifteen years;—or imprisonment [with or without hard labour, and solitary for not more than one month at a time, or three months in a year, s. 12] for not more than three years. 1 Vict. c. 89, s. 6.

An attempt to commit the offence of setting fire to a ship or vessel, is now punishable with transportation for not more than fifteen years,—or imprisonment [with or without hard labour, and solitary for not more than one month at a time or three months in a year, s. 11] for not more than three years. 8 & 9 Vict. c. 25, s. 7.

Evidence.

To maintain this indictment, the prosecutor must prove—

1. That the defendant set fire to, cast away, or destroyed the ship, as stated in the indictment. *See ante, p. 486.* And a part owner may be guilty of this offence, or as accessory before the fact in causing it to be done by others. *R. v. Phillip, Ry. & M. 263. R. v. Wallace et al., Car. & M. 200.* And the accessory may be tried for it, as for a substantive felony, although the principal be not amenable to justice. *R. v. Wallace et al., supra.*

2. The ownership, as *ante, p. 526.*

3. The intent to prejudice the owners, or a part owner,—or the owner of goods on board,—or the underwriters who have underwritten a policy of insurance on the ship, freight, or goods,—as laid in the indictment. Where a part owner was indicted for setting fire to a ship, with intent to injure the other owners, it was objected that there was no evidence whatever of malice against the other owners, from which the intent could be presumed: but the judges held that as the act of setting fire to the ship must necessarily prejudice the owners, the prisoner must be presumed to have intended that which was the natural result of his act. *R. v. Phillip, Ry. & M. 263.* If the intent laid be, to prejudice the owner of goods laden on board, evidence must be given that the goods were

Destroying Ships otherwise than by Fire. 529

put on board, and were on board at the time the offence was committed, with proof of ownership. If the intent laid be to prejudice the underwriters, the policy must be produced and proved; and the inception of the risk, as that the ship sailed on the voyage in question, &c., must likewise be proved. And the natural effect of the destruction of the vessel being to prejudice the owners of the ship, the owners of the goods on board, and the underwriters, the fact by itself, if proved to be wilful, will be sufficient evidence that it was done with intent to prejudice those persons respectively.

Damaging a Ship otherwise than by Fire.

Indictment.

— } The jurors for our Lady the Queen, upon their
to wit. } oath present, that A. B., on the — day of —,
in the year of our Lord —, unlawfully, maliciously, and
feloniously did [upon the high sea] damage [*“damage other-
wise than by fire”*] a ship and vessel called the —, the
property of C. D., [then being upon the high sea], by them
[*state how the damage was effected*], with intent thereby to
destroy the said ship and vessel [or to render the said ship
and vessel useless]: against the form of the statute in such
case made and provided, and against the peace of our Lady
the Queen, her crown and dignity. [*Where the indictment
was objected to, because it did not expressly charge the
damage to have been “otherwise than by fire,” Patteson, J.,
held it not to be necessary, the particular mode in which the
vessel was damaged being stated. R. v. Bowyer, 4 Car. &
P. 559.*]

*Felony; transportation for seven years;—or imprison-
ment [with or without hard labour, s. 27] for not more than
two years, and if a male, to be once, twice, or thrice publicly
or privately whipped, if the court think fit. 7 & 8 G. 4,
c. 30, s. 10.*

Evidence.

To maintain this indictment, the prosecutor must prove—

1. That the defendant wilfully damaged the ship in question, in the manner stated in the indictment; from which the jury may fairly infer malice. It is immaterial whether the ship was complete or in an unfinished state at the time. 7 & 8 G. 4, c. 30, s. 10.

2. The ownership of the ship, as *ante*, p. 526. If this can-
a a

680 *Doing anything tending to the Loss of a Ship.*

not be proved; the ship may be stated in the indictment to be the property "of some person or persons to the jurors aforesaid unknown."

3. Circumstances from which the jury may fairly presume that the damage was committed with intent to destroy the ship, or to render it useless.

Exhibiting False Lights, to bring a Ship into Danger.

Indictment.

— } The jurors for our Lady the Queen, upon their
to wit. { oath present, that before and at the time of the
committing of the offence hereinafter mentioned, a certain
ship, the property of some person or persons to the jurors
aforesaid unknown, was sailing upon the high sea, near unto
the parish of —, in the county of —, and that A. B., well
knowing the premises, on the — day of —, in the year of
our Lord —, unlawfully and feloniously did exhibit a false
light ["false light or signal"], at a certain place within the
parish, and county aforesaid, with intent thereby then to
bring the said ship into danger: against the form of the
statute in such case made and provided, and against the peace
of our Lady the Queen, her crown and dignity.

Felony, death. 1 Vict. c. 89, s. 5.

Evidence.

To maintain this indictment, the prosecutor must prove—

1. That a ship was sailing near the coast, and that the defendant exhibited a false light, whilst the ship was in sight of the place where it was exhibited.

2. Circumstances from which the jury may fairly presume that the act was done for the purpose of bringing the ship into danger.

Doing anything tending to the Loss of a Ship in Distress.

Indictment.

— } The jurors for our Lady the Queen, upon their
to wit. { oath present, that before and at the time of the
offence hereinafter mentioned, a certain ship, the property of
some person or persons to the jurors aforesaid unknown, was
sailing upon the high sea, near unto the parish of —, in the

Destroying a Ship in Distress or Wrecked. 631

county of —, and was then in distress; and that A. B., well knowing the premises, but unlawfully and maliciously intending to do something which would tend to the immediate loss and destruction of the said ship, on the — day of —, in the year of our Lord —, and whilst the said ship was so in distress as aforesaid, unlawfully, maliciously, and feloniously did [*here state what was done by the prisoner*], the said [*act of the prisoner, stating it shortly*] as aforesaid, then tending to the immediate loss and destruction of the said ship: against the form of the statute in such case made and provided, and against the peace of our Lady the Queen, her crown and dignity.

Felony, death. 1 Vict. c. 89, s. 5. *As to destroying buoys or buoy ropes, &c., see stat. 1 & 2 G. 4, c. 75, s. 1.*

Evidence.

To maintain this indictment, the prosecutor must prove—

1. That the ship in question was in distress, as stated, and that the prisoner knew it.
2. The act of the prisoner, as stated in the indictment; and if it were wilfully done, the jury may presume it to have been done maliciously.
3. That the act tended to the immediate loss or destruction of the ship.

Destroying a Ship in Distress or Wrecked, or Goods belonging to it.

Indictment.

— } The jurors for our Lady the Queen, upon their
to wit. } oath present, that before and at the time of the committing of the offence hereinafter mentioned, a certain ship, the property of some person or persons to the jurors aforesaid unknown, was stranded and cast on shore [*“in distress or wrecked, stranded or cast on shore”*] and that A. B., on the — day of —, in the year of our Lord —, and whilst the said ship was so stranded and cast on shore, unlawfully, maliciously, and feloniously did destroy a certain part of the said ship, to wit, the — of the said ship [*“any part of any ship or vessel,—or any goods, merchandise, or articles of any kind belonging to such ship or vessel”*]: against the form of the statute in such case made and provided, and

532 *Impeding a Person saving himself from Wreck.*

against the peace of our Lady the Queen, her crown and dignity.

Felony ; transportation for not more than fifteen years, or less than ten ;—or imprisonment [with or without hard labour, and solitary for not more than a month at a time, or three months in a year, s. 12] for not more than three years. 1 Vict. c. 89, s. 8.

Evidence.

To maintain this indictment, the prosecutor must prove—

1. That the ship in question was stranded or cast on shore, as stated.

2. That the part alleged to have been destroyed was destroyed by the prisoner, as charged in the indictment ; or that he was present aiding and abetting. And if it be proved to have been wilfully done, the jury may thence fairly presume that it was done maliciously.

Impeding a Person saving himself from Wreck.

Indictment

— } The jurors for our Lady the Queen, upon their
to wit. { oath present, that before and at the time of the
committing of the offence hereinafter mentioned, a certain
ship, the property of some person or persons to the jury aforesaid unknown, was stranded and cast on shore, [*“ in distress or wrecked, stranded or cast on shore ”*] ; and that A. B., on the — day of —, in the year of our Lord —, feloniously and by force did prevent and impede a certain man to the jurors aforesaid unknown, whilst he the said man was endeavouring to save his life from the said ship, so stranded and cast ashore as aforesaid : against the form of the statute in such case made and provided, and against the peace of our Lady the Queen, her crown and dignity.

Felony ; transportation for life, or not less than fifteen years ;—or imprisonment [with or without hard labour, and solitary for not more than one month at a time, or three months in a year, s. 12] for not more than three years. 1 Vict. c. 89, s. 7.

Evidence.

To maintain this indictment, the prosecutor must prove—

Threatening Letter to destroy Property. **533**

1. That a ship was stranded or cast on shore, as stated in the indictment.

2. That a man endeavoured to save his life from the ship, after it was stranded, &c.

3. The acts of the prisoner, by which he “by force” impeded or prevented the man, in his endeavour to save his life.

10. Letter, threatening to Burn or Destroy Property, or to Kill or Murder.

Indictment.

— } The jurors for our Lady the Queen, upon their
to wit. } oath present, that A. B., on the — day of —,
in the year of our Lord —, knowingly and feloniously did
send [“*send or deliver, or utter*”] to C. D., a certain letter,
[“*letter or writing*”] directed to the said C. D., by the name
and description of Mr. C. D., threatening to burn his house,
and his stacks of grain, hay, and straw [“*threatening to kill
or murder any other person,—or to burn or destroy any
house, barn, or other building, or any rick or stack of grain,
hay, or straw, or other agricultural produce*”]; and which
said letter is as follows, that is to say,—[*here set out the letter
verbatim*]; against the form of the statute in such case made
and provided, and against the peace of our Lady the Queen,
her crown and dignity. [*As to the venue, see ante, p. 74.*

*Felony; transportation for life, or for not less than seven
years;—or imprisonment [with or without hard labour] for
not more than four years, and if a male, to be once, twice, or
thrice publicly or privately whipped, if the court think fit.*
19 & 11 Vict. c. 66, s. 1.

Evidence.

To maintain this indictment, the prosecutor must prove—

1. The sending of the letter, as *ante*, p. 324.

2. The letter being produced and proved, must be read;
and the prosecutor or other witness must give such explanation,
if necessary and practicable, as to render any doubtful
passage in it intelligible.

SECTION VI.

*Forgery.**Indictment.*

— } The jurors for our Lady the Queen, upon their
to wit. } oath present, that A. B., on the — day of —,
in the year of our Lord —, feloniously did forge a certain
[bill of exchange], with intent thereby then to defraud : against
the form of the statute in such case made and provided, and
against the peace our Lady the Queen, her crown and dignity.
(*Second count for uttering.*) And the jurors aforesaid, upon their
oath aforesaid, do further present that the said A. B., on the —
day of —, in the year aforesaid, feloniously did offer and
utter [*“offer, utter, dispose of, or put off”*] a certain forged
[bill of exchange], with intent thereby then to defraud, he the
said A. B., at the time he so offered and uttered the said last-
mentioned forged [bill of exchange], then well knowing the
the same to be forged : against the form of the statute in such
case made and provided, and against the peace of our Lady
the Queen, her crown and dignity.

The indictment.] *The form of an indictment for forgery, is now very much simplified by the recent statute, 14 & 15 Vict. c. 100. By sect. 5, in any indictment for forging or uttering any instrument, “it shall be sufficient to describe such instrument by any name or designation by which the same may be usually known, or by the purport thereof, without setting out any copy or fac-simile thereof or otherwise describing the same, or the value thereof.” So that the forged instrument may now be described simply by the name by which it is usually known,—as, a certain bill of exchange, promissory note, bank of England note, will, deed, bond, cheque, &c., without further description ; for instance, in the case of a bill of exchange, it is not necessary to state by whom or on whom it purports to be drawn, or by whom accepted, or the date or amount, or at what time after date or sight it is drawn,—or to give any other description than to call it simply “a certain bill of exchange.” And by sect. 8, it shall be sufficient in any indictment for forging, uttering, offering, disposing of, or putting off any instrument whatsoever, “to allege that the defendant did the act with intent to defraud, without alleging the intent of the defendant to be to defraud any particular person ;”*

and upon the trial, "it shall not be necessary to prove an intent on the part of the defendant to defraud any particular person, but it shall be sufficient to prove that the defendant did the act charged with an intent to defraud." The venue may be laid in any county or place in which the defendant shall be apprehended or be in custody. Ante, p. 71. If the forgery consist of an alteration merely, it is deemed in law a forgery of the whole instrument, and will support an indictment for that offence; the point has been ruled upon an indictment on a statute, containing, as the present statute as to forgery does, the word "alter" as well as "forge." R. v. Teague, R. & Ry. 33. R. v. Treble, R. & Ry. 164. Or the indictment may be special, for the alteration, stating that the prisoner did "feloniously alter" the instrument, stating how, and in what particulars. See R. v. Dyson Post, R. & Ry. 101. But where the acceptance alone of a bill of exchange is forged, it cannot be deemed or treated as a forgery of the whole bill. And therefore, where an indictment contained two counts for uttering, one in the usual form for uttering a forged bill of exchange, the other stating that the prisoner, having in his custody and possession a certain bill of exchange (setting it out) with a certain forged acceptance thereon (setting it also out) "feloniously did offer, utter, dispose of, and put off (then and there knowing the said acceptance to be forged) the said bill of exchange:" the evidence proved the acceptance alone to be forged; and it was objected that this did not sustain the first count, for as the statute mentions both the bill and the acceptance, the forgery of the bill could not be deemed to include that of the acceptance; and as to the second count it was bad, as not containing any express averment that the prisoner uttered the forged acceptance, but merely the bill: the prisoner was found guilty; but these objections being reserved for the opinion of the judges, they held the conviction to be wrong. R. v. Horwell, 6 Car. & P. 148, Ry. & M. 405. And the same as to a forged indorsement.

The above form of indictment will be found to answer in all cases of forgery or uttering of a forged instrument, by merely inserting the usual name of the instrument in each count.

Punishment.] Forging, altering, or uttering an exchequer bill or exchequer debenture, or any indorsement on or assignment thereof,—or an East India bond, or any indorsement or assignment thereof,—or a note or bill of the bank of England, called a bank-note or bank bill of exchange, or bank-post bill, or any indorsement or assignment thereof,—or a will, testament, or codicil, or testamentary writing,—a bill of exchange or promissory note, or any indorsement thereon, or

Any acceptance of a bill of exchange,—an undertaking for the payment of money,—or a warrant or order for the payment of money: Felony; 1 W. 4, c. 66, s. 3; transportation for life, or for not less than seven years, or imprisonment [with or without hard labour, and solitary for not more than a month at a time, or three months in a year, s. 3] for not more than four, or less than two years. 1 Vict. c. 84, s. 2.

Forging, altering, or uttering a deed,—a bond,—a court roll, or copy thereof,—a receipt or acquittance for money or goods, an accountable receipt for money or goods or for any note, bill, or other security for money,—or a warrant, order, or request for the delivery or transfer of goods, or for the delivery of any note, bill, or other security for money:—felony, the like punishment. 1 W. 4, c. 66, ss. 10, 26.

Accessories before the fact, the same punishment;—accessories after the fact, imprisonment, &c., for not more than two years. 1 W. 4, c. 66, s. 25.

Forging, altering, or uttering instruments made or purporting to be made out of England,—the same punishment as if the instrument were made or purported to be made in England. Id. s. 30. The punishment in other cases of forgery, shall be mentioned hereafter.

Evidence.

To maintain the first count of this indictment—

1. The instrument must be produced, if forthcoming; and the prosecutor must prove—

2. That it is forged.

3. That it was forged by the defendant.

4. The intent to defraud.

To maintain the second count of the indictment, the prosecutor must prove—

1. The uttering.

2. That the instrument is forged; and for this purpose it must be produced, if forthcoming.

3. That the defendant at the time he uttered or offered it, knew it to be forged.

4. The intent to defraud.

Having thus stated shortly what is necessary to be proved, I shall now proceed to state the manner of proving it; which

I propose to do, under the following heads : 1. the forging ; 2. the uttering ; 3. the instrument forged.

1. The Forging.

Formerly if the instrument charged to be forged, purported to be that of a known existing party, he was not allowed to prove the forgery, but it must have been proved by persons conversant with his handwriting, and who could swear that to the best of their belief the part of the instrument purporting to be of his handwriting, was not so. But by stat. 9 G. 4, c. 32, s. 2, no person shall be an incompetent witness in support of a prosecution for forging or uttering a forged deed, writing, instrument, or other matter, by reason of any interest such person may have or be supposed to have in respect of such deed, writing, instrument, or other matter. And now, by stat 6 & 7 Vict. c. 85, s. 1, no person offered as a witness shall be excluded, by reason of incapacity from interest, from giving evidence, upon the trial of any issue or matter, civil or criminal. See *ante*, p. 151.

If a man draw, accept, or indorse a bill of exchange, in the name of another, without his authority, it is forgery. But if he sign it with his own name, per procuration of the party whom he intends to represent, it is no forgery ; it is no false making of the instrument, but merely a false assumption of authority. This has recently been decided by the criminal court of appeal, with respect to an indorsement on a bill of exchange ; *R. v. White*, 2 Car. & K. 404, 1 Den. 208 ; and may be considered as applying to all instruments signed per procuration ; previously to which, the point was much doubted. But if a man really have the authority of another to use his name, and do so, it is the same as if the other had written it, and is not a forgery ; or even if it be done under circumstances that the writer may fairly and *bonâ fide* think that he has the authority of the other party (and which is a question for the jury), it is not a forgery. *Per Coleridge, J. in R. v. Forbes*, 7 Car. & P. 224. But if he did so without authority, even although intending to pay or take up the bill, &c., before or when it should become due, and expecting to be able to do so, it would be forgery. *Id.* So, if a man exceed an authority given to him, with intent to defraud,—as if a blank acceptance be given to a man, with authority to draw a bill for a certain amount, and he fraudulently draw it for a larger amount, it is a forgery. *R. v. Minter Hart*, 7 Car. & P. 652, Ry. & M. 486. So where the prosecutor gave a blank cheque upon his bankers, to his clerk, to draw a cheque for the amount of a bill and expenses which he had to provide for, and the clerk filled up the cheque for a much larger

amount, and kept the whole of it, under a claim of its being due to him for salary, but which the master at the trial wholly denied: the judges held this to be forgery. *R. v. Wilson*, 2 *Car. & K.* 527.

If a bill of exchange, &c., be drawn, accepted, or indorsed in the name of a fictitious person, this is deemed a forgery, and will support an indictment for forging the bill, acceptance, or indorsement respectively. Where the prisoner obtained money from one Blackwell, for a cheque on Jones, Lloyd, & Co., bankers, purporting to be drawn by G. Andrewes, in favour of — Newman, esquire, or bearer, telling him at the same time that it was for Mr. Newman, of Soho-square, in whose service he had been for three months, and that Mr. Newman had put his name on the back of it; upon his being indicted for forging and uttering this cheque, it was proved that no person of the name of G. Andrewes kept cash at Jones, Lloyd's, and that the name on the back of the cheque was not that of Mr. Newman, of Soho-square, and that the prisoner had never been in that gentleman's service: Parke, J., (after conferring with Gaselee, J.,) held this to be sufficient *prima facie* evidence that "G. Andrewes" was a fictitious person, and told the jury that if they were of that opinion, they should find the prisoner guilty; if the cheque were really drawn by a person named G. Andrews, (in which case the offence would be a fraud only, and not a forgery), the prisoner might have produced him, or given some evidence on the subject: the prisoner was found guilty of the uttering. *R. v. Backler*, 5 *Car. & P.* 118. Where the prisoner went to the shop of a silversmith, and after selecting several articles, took out his purse, as if to pay for them, but saying he had not money enough about him, tendered a cheque upon a banker, purporting to be drawn by H. Turner, of Green-street, for six guineas; the silversmith took down his address as H. Turner, (imagining him to be the drawer of the cheque) and the prisoner, looking over him, desired him to add "junior, Noah's-row, Hampton-court;" the cheque was presented and dishonoured, no such person as H. Turner keeping cash at the banker's, and no person of the name residing in Green's-street or at Hampton-court, nor was there any such place as Noah's-row there: the prisoner being indicted for forging the cheque, was found guilty; and the judges held the conviction to be right. *R. v. Sheppard*, 2 *East*, *P. C.* 967. 1 *Leach*, 285. Where a bill, purporting to be drawn by Thomas Webb, of Nottingham, and to be accepted by Samuel Knight, Market-place, Birmingham, was passed by the prisoner to the prosecutor, the prisoner representing his name to be King, of King's-square, which he said was chiefly his property: upon an indictment against him for forging and uttering this bill, the prosecutor proved that he went twice to Birmingham

to inquire after Knight, the acceptor; but could find no such person; that he made inquiries at Nottingham for Webb, the drawer, but could not find him; and that he made enquiries for the prisoner at King's-square, but could not hear of any such person there; on his cross-examination he admitted that he was a stranger at these places; and no person acquainted with them was called as a witness: Parke, J., after conferring with the other judges present, held, that although this was not very satisfactory evidence, nor the usual evidence in such cases, yet that it was evidence to go to the jury of this being a fictitious bill: the prisoner was ultimately acquitted. *R. v. King*, 5 *Car. & P.* 123. Where the prisoner, James Bolland, having a genuine note, indorsed by the payee, indorsed his own name upon it, for the purpose of getting it discounted; but it being suggested to him that, for reasons, his name being upon it might prevent its being negotiated, he erased the surname, except the initial letter, and added "anks," making the name James Banks; being afterwards asked by the person who was about to discount the note, who James Banks was, he said he was a person of property, residing in Rathbone-place, and dealt largely in wines and spirits: the drawer and payee of the note becoming bankrupt, and no such person as Banks being found in Rathbone-place, Bolland being applied to, denied all knowledge of the note; he was then apprehended and charged with the forgery, when some person, in the name of James Banks, paid the amount to the holder; Bolland nevertheless was indicted for the forgery, and convicted; and the case being reserved for the opinion of the judges, they held the conviction right, and he was executed. *Bolland's case*, 2 *East*, *P. C.* 958. 1 *Leach*, 83. Where the prisoner was indicted for forging and uttering a cheque on Cox, Greenwood, & Co., who were army agents and bankers, purporting to be drawn by one John Weston; a clerk of Cox, Greenwood, & Co., to whom the cheque had been presented and who had refused to pay it, proved that no person of the name of John Weston kept an account with his employers; however, in cross-examination, he admitted that he was clerk in the army department of the house, and not in that of the bank, and that he did not know all the customers, but he added that he did not know any customer of the name of Weston, and that upon enquiry of the other clerks, he found there was no such person: Parke, J., held this to be *prima facie* evidence for the jury, sufficient to call upon the prisoner to show who the drawer of the cheque really was; and Patteson, J., and Gurney, B., concurred. *R. v. Brannan*, 6 *Car. & P.* 326. But where, upon an indictment for forging a bill of exchange, which appeared to be drawn by the prisoner upon "Thomas Bowden, baize manufacturer, Romford, Essex," and was accepted "Thomas Bowden, payable when due at No. 40,

Castle-street, Holborn, London," it was proved on the part of the prosecution that no such person lived at 40, Castle-street, or had ever lived or was known at Romford; but, for the prisoner, it was proved that the acceptance was the genuine signature of Thomas Bowden (who, however, never was a haize manufacturer at Romford), and the occupier of the house in Castle-street said that he knew the acceptor, but he had never given him authority to make bills payable at his house: the prisoner was convicted; but the case being reserved for the opinion of the judges, a majority of them held, that thus adopting a false description and addition, where a false name was not assumed, and where there was no person answering the description or addition given, was not a forgery, and they directed an application to be made for a pardon. *R. v. Webb, R. & Ry.* 405. So, where it appeared that the prisoner, in payment of wheat which he had purchased from the prosecutor, indorsed to him a bill for 200*l.*, drawn by Hy. Williams & Co., Swansea bank, upon "Messrs. Williams & Co., bankers, Birchin-lane, London," with a small figure 3 in the corner, but it did not exactly appear whether that was on the bill at the time it was indorsed, or not; there was a balance of 40*l.* still due to the prosecutor, for which the prisoner drew a bill upon the same parties; there was a respectable banking house, of the firm of Williams, Birch, & Co., at No. 20, Birchin-lane, who usually accepted bills as "Williams & Co.;" there was also, at No. 3, Birchin-lane, a counting-house, having on a large brass plate on the door "Williams & Co.;" at the time he drew the second bill, the prisoner was asked whether the drawees were Williams, Birch, & Co., and he said they were; the 200*l.* was presented at No. 3, Birchin-lane, for acceptance, and was accepted: the prisoner being indicted for forging and uttering this bill, and being found guilty, the case was reserved for the opinion of the judges; ten of whom held, that the facts proved did not amount to the crime of forgery, and therefore recommended a pardon. *R. v. Watts, R. & Ry.* 436. But in general where it appears that the prisoner, by his representations as to the party to an instrument, identifies him with a particular known person, and it turns out not to be that person, and the misrepresentation was made for the purpose of fraud, that will be at least *prima facie* evidence of forgery. Where, therefore, the prisoner uttered a promissory note, purporting to be drawn by one Wm. Holland, and payable to the prisoner or his order; and when he passed the note, he represented to the person to whom he passed it, that it was drawn by Wm. Holland, who kept the Bull's Head, at Tipton; upon the trial, that Wm. Holland proved that the note was not drawn by him, but he said that there was a gentleman (not in business) of the same name at Tipton: the prisoner being convicted, the judges held, that as

the prisoner represented that Wm. Holland, who kept the Bull's Head, at Tipton, was the maker of the note, and as he himself as payee must have known the particulars, it was sufficient for the prosecutor to show that it was not the note of Wm. Holland, of the Bull's Head, and it lay on the prisoner to prove it to be the genuine note of another Wm. Holland, if such were the fact. *R. v. Hampton, Ry. & M.* 255. So, where the prisoner agreed with the prosecutor for the purchase of some property for 100*l.* for (as he alleged) Messrs. Nicholson & Co., of Ipswich, whom he represented as general merchants there, and highly respectable men, and after some days he produced to the prosecutor two bills for 50*l.* each, purporting to be accepted by "Nicholson & Co.," payable at Praed & Co.'s, Fleet-street, the place for the prosecutor's name, as drawer, being left blank, to be filled up by him; when the bills became due, they were presented at Praed's for payment, but refused: the prisoner being indicted for forging and uttering these bills, it was proved that the body of each bill was in the prisoner's handwriting, that no such persons as Nicholson & Co. resided or were general merchants at Ipswich, and that no such persons ever had an account at Praed's; on the other hand, a witness for the prisoner proved that he had often seen a person named T. Nicholson at the prisoner's office, but he had never seen him write; and it was urged on the part of the prisoner that this was like Webb's case, *ante*, p. 540, where it was holden that a mere false description or addition of the party, could not constitute forgery: but Bosanquet, J., held that if this acceptance were even written by Nicholson, yet if he did it to represent a fictitious firm, for the purpose of fraud, it was a forgery; the prisoner was found guilty of the uttering. *R. v. Rogers*, 8 *Car. & P.* 629.

So if a man assume a false name for the purpose of fraud, and draw and accept, or indorse a bill, &c., in that name, it will be forgery. Where a man named John Henry Aickles, who was well known, having several times been tried at the Old Bailey, took a house in Argyle-street, by the name of John Mason, and in that name drew a promissory note, which one Byron passed to Gedge, the prosecutor, for some linen; but Gedge's shopman, before he let him have the linen, called at the house in Argyle-street, and saw the prisoner, who told him that his name was John Mason, that the note was his, and that it would be paid: being indicted for forging this, many of the judges were of opinion that it was forgery, many that it was not, and in the mean time, Ashurst, J., imagining that the judges had decided that it was not, gave judgment at the Old Bailey accordingly. *Aickle's case*, 2 *East, P. C.* 968. But where a woman, named Mary Dunn, pretending that she was the widow of one Wallace, a deceased seaman, obtained money of Hooper, the prosecutor, on account of the wages due to

Wallace, upon her giving him a promissory note for the amount; as she could not write, Hooper drew the note, and asking her what name he should put to it, she said Mary Wallace, which was accordingly done and she signed by a cross: being indicted for this as a forgery, and convicted, the case was reserved for the opinion of the judges, nine of whom declared it to be forgery. *Dunn's case, 2 East, P. C. 962.* So, where the prisoner, upon purchasing a horse from the prosecutor, gave in payment a bill for 28*l.*, drawn on bankers in London, with 10*l.* in money; being asked to indorse the bill, he indorsed it "Luke Marsden," and being asked where he lived, he replied in York; the name "Luke Marsden" did not particularly induce the prosecutor to take the bill, for if the prisoner had indorsed it in any other name he would have taken it as readily; the bill being returned dishonoured, it was ascertained upon inquiry that the real name of the prisoner was Thomas Marshall, and he had never before gone by any other, and that although he had lived in York, he had left it a year and a half before this transaction: the prisoner being indicted for forging this indorsement and convicted, the judges held the conviction right, it appearing that there was no doubt of the intent to defraud. *R. v. Marshall R. & Ry. 75. S. P. R. v. Taft alias Tuft, 2 East, P. C. 959.* So, where the prisoner, named Taylor, upon receiving payment of a bill of exchange, wrote a receipt on it and signed it "W. Wilson;" it appeared that he had got possession of the bill by some undue means, and the fictitious name was used to elude inquiry: being indicted and convicted, as for forging a receipt, the case was reserved for the opinion of the judges, eleven of whom held it to be forgery; for although the prisoner did not gain any additional credit by signing as he had done, yet it was a forgery, for it was to defraud the owner, by preventing him from tracing the person by whom the money was received. *R. v. Taylor, 2 East, P. C. 960. 1 Leach, 255.* So, where the prisoner purchased some furniture from an upholsterer at Bath, giving his name and address "Samuel Millward, No. 12, Kensington-place, Bath;" the goods were sent, and other goods ordered by him shortly afterwards, amounting in all to 49*l.* 10*s.*: he then ordered his account, saying he would give the prosecutor his bill on his bankers in London, for the amount; and he shortly afterwards brought him a bill for 60*l.*, purporting to be drawn by Samuel Milward on Messrs. Stephenson & Co., bankers, London, payable to his own order, and indorsed "Samuel Milward," and the prosecutor paid him the balance, 10*l.* 10*s.* in money; upon this bill being returned dishonoured, no person of the name of Milward having an account at Stephenson's, the prosecutor went to the prisoner's house, when he found it shut up and the prisoner gone away; the real name of the prisoner

was Samuel Whiley, and he had always been known by that name up to the time of this transaction ; but the prosecutor was not induced by the assumed name of Milward, to give him credit, he would have done so equally if he had gone by the name of Whiley : being indicted for forging this bill, the jury found him guilty, saying they were satisfied that he assumed the name for the purpose of defrauding the prosecutor ; and the judges held the conviction to be right. *R. v. Whiley, R. & Ry. 90.* So, where the prisoner took lodgings of the prosecutrix in the name of James Cook, and resided in them ; about a month afterwards he gave the prosecutrix a check in the name of Cook, on Messrs. Praed & Co., bankers, for 15*l.*, for which she gave him the money, but which on presentment was dishonoured : upon the prisoner being informed of this, he said it was a mistake, he having forgotten to add " Junior " to his name ; this he accordingly added, but before the cheque was returned a second time, he absconded ; the prisoner's real name was John Francis ; he had gone for a time by the name of Frederick Mordaunt, but never assumed the name of Cook, until he took the lodgings, and by that name alone he was known to the prosecutrix ; no person of the name of James Cook had an account at Praeds : the prisoner being indicted and convicted for forging this cheque, the judges held the conviction to be right. *R. v. Francis, R. & Ry. 209.* So, where the prisoner, under the assumed name of Thomas White, and pretending that he was a clergyman, obtained a curacy in Gloucestershire ; he said he had a living in Ireland, for the profits of which he drew quarterly on an agent in Dublin, who accepted his bills, payable at a banker's, in London, and that he was in daily expectation of receiving one of these acceptances ; about three weeks afterwards, pretending that he had one of these acceptances, he got the churchwarden to discount it for him ; the bill purported to be drawn about a fortnight previously by Thomas White at two months after date, payable to his own order, on W. Jennings, esquire, Dublin, and had written across it " accepted, payable at Hamerleys & Co., bankers, London, W. Jennings ; " when it became due, it was dishonoured, but about a fortnight previously the prisoner, finding that suspicion was excited, absconded ; and when shortly afterwards he was apprehended, he was going by the name of Williamson, and denied that he had ever been known by that of White : being indicted for forging and uttering this bill, the acceptance and the indorsement, it was proved that the prisoner's real name was Robert Peacock, and by that name he had always previously been known, and that he had never been in holy orders ; several witnesses proved the body of the bill and the signature of the drawer and indorser, to be in the prisoner's handwriting, and they believed the acceptance also to be his ; the judge

in his summing up, told the jury, that if they were of opinion that the prisoner assumed the name of White, merely for the purpose of obtaining the curacy and the salary attached to it, and that he had no intention at the time to obtain money by means of such a bill as this, they should acquit him ; but if they thought that at the time he obtained the curacy, he also contemplated the raising of money by bills drawn and indorsed in his false name of White, (and the facts of the case strongly indicated this), they should find him guilty : the jury found him guilty of forging the bill and the indorsement, but not the acceptance ; and the judges held the conviction to be right ; they held that where a prisoner is proved to have assumed a false name, for the purpose of pecuniary fraud connected with the forgery, a drawing, accepting, or indorsing in such false or assumed name, is forgery ; and that where proof is given of the prisoner's real name, and no proof of any change of name until the time of the fraud committed, it throws on the prisoner the onus of proving that he had before assumed the false name on other occasions and for other purposes. *R. v. Peacock, R. & Ry.* 178. And therefore where it was proved that the prisoner, who had accepted a bill drawn upon him, in the name of Thomas Scott, had formerly been known as Thomas Bontien, but it was also proved that for three years previous to the transaction in question, he had gone by the name of Scott, and was known to the witness by that name only ; the judges held this not to be a forgery. *R. v. Bontien, R. & Ry.* 260.

Proof of the alteration of the instrument in any material part after it has been completed, will also be good evidence to support an indictment for forging it. Where the prisoner was indicted for forging a bill for 50*l.* and the proof was that he altered a genuine bill of the drawer for 10*l.* to a bill for 50*l.*, by changing the ten to fifty : it was objected that the prisoner could not be convicted on this indictment, as the statute made the alteration a distinct offence from that of forging, the words being "if any person shall forge or alter," &c. : but the prisoner being convicted, and the point reserved, the judges held the conviction right, and that it was not necessary to state in the indictment, that the prisoner altered the note. *R. v. Teagus, R. & Ry.* 33. So, where the prisoner was indicted for forging a promissory note for 10*l.* ; and the evidence was that the note in question (which was a ten pound note of the Fordingbridge bank) had originally been made payable, in the body of it, either at the country bank or "at the house of Wilkinson, Bloxham, & Co., in London ;" it had been paid by Wilkinson, Bloxham, & Co., and sent by them, with many others, in a parcel by the mail, to the drawers in the country, but the parcel was stolen from the mail and never reached the country bankers ; Wilkinson, Bloxham,

Co., afterwards failed; and it appeared that the prisoner, having disguised himself, exchanged the note in question at a banking house in Worthing for other notes, the words "Willinson, Bloxham, & Co." in the note being covered with a nail piece of paper, on which was engraved the firm of Ambottom & Co., thereby giving to the note the appearance of being payable at a solvent, instead of an insolvent house: it was objected that the alteration was not in any binding or obligatory part of the note, and therefore did not amount to the crime of forgery; but the prisoner being convicted, and the point reserved, the judges held the conviction to be right: the place where the note was payable being stated in the body of the note, materially affected the engagement of the drawers, and was necessary to be stated in declaring on the note; some of the judges held it to be material, as it materially affected the negotiability. *R. v. Treble, R. & Ry.* 164. The instrument, however, must be perfect at the time it is altered, to make the alteration a forgery; and, therefore, where a cheque by overseers of the poor on the treasurer of a union (which must be signed by a majority to be of any validity) was fraudulently altered after it was signed by one only, and then it was signed by the others without detecting the alteration: *Platt, B.*, held that it could not be treated as a forgery. *R. v. Turpin, 2 Car. & K.* 820. Where, however, the prisoner, who had been a clerk with country bankers, got possession of one of their blank bills, on their London agents, (which was signed but not filled up), filled it up for a certain sum, and uttered it: the judges held this to be forgery; *R. v. Birkett, R. & Ry.* 86; but this was rather an actual forging of the instrument, than an alteration of it. In these cases, the pleader has his option of indicting for the forgery in the ordinary way, or of framing his indictment specially for the alteration. *Ante*, p. 535. In *Dyson Post's* case, *R. & Ry.* 101, which was for altering a note of a country bank from one to ten pounds, the indictment was special for the alteration.

Upon an indictment for forging the instrument, besides proving the instrument to be forged, the prosecutor must prove that the defendant forged it. This is done, either by direct evidence of the forgery, or by proof of facts from which the jury may fairly presume it. The usual evidence is, that the instrument, or some material part of it, is, or purports to be, in his handwriting. Where the prisoner procured a boy to execute a deed of transfer of shares in a railway company, and he himself was present at the time, he was indicted for the forgery and convicted. *R. v. Hoatson, 2 Car. & K.* 777. So, if he procure the forgery to be committed by an innocent agent, he may himself be indicted for forging the instrument. *R. v. Clifford, Id.* 202. Where it was committed, is now immaterial; for it is no longer necessary to state the place in the

body of the indictment, 14 & 15 Vict. c. 100, s. 23, *ante*, p. 85, and as the offender may be indicted and tried in the county in which he has been apprehended or is in custody, (1 W. 4, c. 66, s. 24), his being in custody before the court at the time of his trial, satisfies the venue, and gives the court jurisdiction. *R. v. Smythes*, 19 Law J. 31 m. See *ante*, pp. 71, 72.

It must be proved, or must appear from the facts of the case, that by forging the instrument, the defendant had an intent to defraud some person. There have been a number of decisions upon the question whether the forgery was committed with intent to defraud some particular person; but these are now inapplicable, as by stat. 14 & 15 Vict. c. 100, s. 8, it is no longer necessary to allege in the indictment, that the act was done with intent to defraud any particular person, it is merely necessary to allege it to have been done "with intent to defraud;" and the evidence is now confined to the proof of an intent to defraud some person or other. The very act of the forgery itself, will be sufficient to imply an intent to defraud; or at all events, it will be sufficient, if from the circumstances of the case, the jury can fairly infer that it was the intention of the party to utter the forged instrument; for the necessary effect of the uttering, if successful, must be to defraud. Where the prisoner deposited with a person, as security for a debt, a bill of exchange payable to his own order, but not indorsed by him, and the party was aware at the time that no use could be made of it until he indorsed it; being indicted for forging this bill, with intent to defraud the party with whom he deposited it, the judge summed up the case with respect to the forgery, and the jury found the prisoner guilty; but the judge afterwards doubting whether he should not have left the question as to fraudulent intent more open to the jury, as they might perhaps have found that the prisoner did not mean to defraud any person, but, by paying the debt and taking back the bill, to make no further use of it, respite the judgment, and reserved the point for the judges, who held, that as the bill was lodged with the creditor to obtain credit, though as a pledge only, that proved the fraudulent intent laid in the indictment. *R. v. Birkett*, R. & Ry. 86. If however it appear that no fraud whatever could have been effected by the forgery, there no fraud could be intended, and the defendant will be entitled to an acquittal. In one case, where a share broker bought and paid for 100 shares in a railway company, for and in the name of one Lupton (who had employed him to a considerable extent), but without his authority or knowledge; he afterwards sold these shares at a profit for Lupton to several persons, and forged Lupton's name to the deeds of transfer: being indicted for these forgeries, Cresswell, J., held that the prisoner could not be convicted, as no fraud was intended or could have

been effected; the company could not have been defrauded, for it appeared that all the shares had been paid up, and it was indifferent to them whether A. or B. was the proprietor of the shares; Lupton was not defrauded, for he was a gainer by the purchase and sale of the shares, and it was evidently not intended to defraud him, but to benefit him; and the purchasers of the shares were not defrauded or intended to be defrauded, for they had the shares which they had bargained for and purchased. *R. v. Marcus*, 2 Car. & K. 356. But in a later case, Rolfe, B., seemed not entirely to agree with this decision; it was a case where the prisoner had purchased 200 shares in a railway company, of one Lucas, a broker; and according as he sold them, he sent Lucas the money, and Lucas sent him the certificates, and the transfer executed; in this manner he had sold 180 shares, and had them regularly transferred to the purchasers; as to the remaining twenty, the money was sent to Lucas, and he sent the prisoner the certificates, but he hesitated to send the transfer, claiming to have a lien upon it for a balance due to him from the prisoner on other dealings; the prisoner wishing to perfect the title to these twenty shares, prepared a transfer of them, got a boy to forge the name of the transferor, and another to attest his signature, and then sold the shares: being indicted for the forgery, it was objected, as in the last case, that no fraud could have been intended, for none was or could be effected;—not on the company, for all the shares had been paid up; not on the seller of the shares or Lucas the broker, for they were paid for them; and not on the party who bought them, for they were delivered to him;—and therefore the prisoner ought not to be convicted: but Rolfe, B., said that he could not assent to that view of the law; by the forgery, Lucas was defrauded of his lien, the owner of the shares was defrauded of some right, even if it were only that of voting at meetings, which he possessed until the transfer was regularly executed, and he thought that it was a fraud upon the company also; the prisoner was found guilty. *R. v. Hoatson*, 2 Car. & K. 777.

2. *The Uttering.*

The words used in the statute, to express the passing or putting off a forged instrument to another as a genuine instrument, or an attempt to do so, are “offer, utter, dispose of, or put off,”—which will be found to embrace every mode of disposing or attempting to dispose of a forged instrument for value. This however must be considered with reference to the particular nature of the instrument. Where a party merely exhibited a forged receipt to the person with whom he sought to obtain credit for it, but refused to part with the possession

of it, this was holden to be an uttering of it within the meaning of the statute; *R. v. Radford*, 1 Car. & K. 707; although it would be otherwise in the case of a bill of exchange, or the like. Depositing a forged bill of exchange with a banker, as a security, has been holden to be an uttering of it. *R. v. Cook*, 8 Car. & P. 582; and see *R. v. Birkett*, ante, p. 546. And not only the party who actually uttered the forged instrument, but also any person who was aiding or abetting in it, may be convicted on the count for uttering, ante, p. 534. But where three prisoners, Badcock, Brady, and Hill, were indicted for uttering a cheque, and it was proved that the uttering was planned by the three prisoners and several others, but the prisoner Badcock alone acted immediately in it; he gave the forged cheque to a porter, whom he did not know, to get money for it at the banker's, and he received the money from the porter as soon as he obtained it; nothing was proved against Brady, except that he assisted in planning the uttering, and he was to receive his share of the produce; and as to Hill, he was proved to have been ill at Brighton at the time, and was therefore acquitted: the other two being convicted, the judges held the conviction of Brady to be wrong. *R. v. Badcock, Brady, and Hill*, R. & Ry. 249. So, upon an indictment for disposing of and putting off forged notes of the Bank of England, it appeared from the evidence of a witness that he bargained with the prisoners for the notes, and paid them for them; one of the prisoners, Stewart, desired Ann Dickins "to go up yonder," and that he and the witness would meet her at the old spot; Dickins accordingly went, and Stewart and the witness followed in some time after, and met Dickins, when Stewart, after conversing with Dickins apart for some time, said to the witness, "you see Ann there," (pointing to another woman at a distance of about 100 yards) "whom you have seen at our house, she will deliver you the goods;" the witness then went to Ann, and after walking together along the road for some time, she gave him the forged notes, but he could not say whether the prisoners were then within sight or not: the prisoners being convicted, the judges held the conviction to be wrong, as it was quite clear that the woman Ann was a guilty agent, and the prisoners were not proved to have been present when the notes were delivered; the judges therefore recommended a special pardon for this offence, and directed the prisoners to be detained until the next assizes, to be tried as accessories before the fact. *R. v. Stewart and Dickins*, R. & Ry. 363. Where one Giles purchased forged bank notes for the purpose of passing them, and employed one Burr to go into several shops, purchase articles, pay for them with the forged notes and receive the change, whilst he (Giles) stood at some distance in the street waiting for him; Giles being indicted for disposing of and putting off one of these notes, the

judge told the jury that if Burr was an innocent agent, and knew not that the note was a forgery, they should find Giles guilty; but if Burr knew the note was bad, Giles should be acquitted; the jury accordingly found Giles guilty, saying that they thought Burr an innocent agent: the case however being reserved for the opinion of the judges, it appeared to them from the evidence that Burr knew the note to be forged, but they held that the giving of the note by Giles to Burr, that he might pass it, was a disposing of it to him, and that the conviction was therefore right. *R. v. Giles, Ry. & M.* 166. Where upon an indictment against two persons, Palmer and Hudson, containing a count for uttering, and also a count for disposing of and putting off, a forged bank note, it was proved that Palmer, who was in the habit of putting off forged notes, had employed Hudson to assist him, and gave the note in question to Hudson to pass; Palmer remained in the neighbourhood of the Old Bailey, whilst Hudson went to a shop in Newgate-street, bargained for some muslin, and tendered the note in question in payment; the shopkeeper thinking it bad, stopped it and sent it to the Bank, where it was declared to be a forgery; both Palmer and Hudson called at the shop the same night, and Palmer insisted on the note being delivered to him, saying that it was his, and that he had sent Hudson with it; but the shopkeeper refused, and had both the prisoners taken into custody: the jury found Palmer guilty, and acquitted Hudson; and a majority of the judges held that Palmer was properly convicted, upon the count of for disposing of and putting off the forged note. *R. v. Palmer and Hudson, R. & Ry.* 72. But where, upon a similar indictment against three prisoners, it appeared that all three were equally concerned in some forged notes, and one of them, in concert with the other two, took one of the notes, crossed the water from Portsmouth to Gosport, (leaving the other two prisoners waiting for him at Portsmouth,) and there attempted to pass the forged note: all being found guilty, the judges held the conviction wrong as to the two prisoners who were not present at the time the note was uttered. *R. v. Soares, Atkinson, and Brighton, R. & Ry.* 25. Where upon an indictment for disposing of forged bank notes, it appeared that the magistrates, with the approbation of the agents of the Bank, employed two persons to detect those they suspected to be utterers; these persons applied to the prisoners to purchase forged notes from them, and the prisoners supplied them: upon the trial it was objected, first, that the indictment was too general and bad, in not stating the particular manner in which the notes were disposed of; and secondly, that the prisoners ought not to be convicted, because as they were induced to dispose of the notes by the prosecutors themselves, by means of their agents, the prosecutors could not be defrauded

by the transaction : the prisoners being convicted, and the case reserved for the opinion of the judges, the judges held the conviction to be right ; as to the indictment, it was in the usual form ; and as to the defrauding of the prosecutors, the intent to defraud being the essence of the crime, it was immaterial whether the prosecutors were defrauded, or could have been defrauded, or not. *R. v. Holden et al., R. & Ry.* 154. Where the prisoners, husband and wife, were indicted, the wife with forging and uttering an order and certificate for prize money, and the husband as accessory before the fact ; it was clear, upon the evidence, that the husband planned the matter, and urged and insisted on the wife presenting the forged order, &c., and applying for the prize-money, but he was not present when she did so ; and it was thereupon objected that as it appeared plainly that the wife acted under the compulsion of her husband, she could not be found guilty ; and if she as principal were acquitted, he as accessory must necessarily be acquitted also : both however being convicted, the judges were clearly of opinion that the wife was properly convicted of the uttering, and the husband as accessory. *R. v. Sarah and John Morris, R. & Ry.* 270.

That the instrument is forged, is proved as *ante*, p. 537 ; and the intent to defraud, as *ante*, p. 546. Where the prisoner paid to a creditor a bill of exchange, all the parties to which were fictitious persons, and he knew them to be so, but he intended to take up the bill when it should become due : Alderson, B., left it to the jury to say, whether the prisoner knew the parties to the bill to be fictitious persons at the time he uttered it, and meant the creditor to believe it to be genuine, for if so, they were bound to infer that he intended to defraud the creditor ; the prisoner being convicted, the judges held the conviction to be correct. *R. v. Hill, 8 Car. & P.* 274. See also *R. v. Birkett, ante*, p. 546.

But the prosecutor must not only prove the uttering, the forgery, and the intent to defraud, as above mentioned, but he must also prove that the defendant knew the instrument to be forged, at the time he uttered it ; which of course can only be done by proving facts and circumstances from which the jury may fairly presume it. See *ante*, p. 121. If it be proved that he forged, as well as uttered, the forged instrument, of course no further proof of guilty knowledge is necessary. Where a man uttered a promissory note, signed by himself and in his own name, as and for the promissory note of his brother, the judges held that as it did not appear that he had any brother of that name, it must be taken as being the note of a person who did not exist, and consequently a forgery, and the prisoner when he uttered it knew it of course to be so. *R. v. Parkes and Broton, 2 East, P. C.* 963. And see *Shepherd's case, ante*, p. 538. Or the guilty knowledge may be inferred

from the defendant's having given false accounts as to the parties to the instrument, or having other forgeries of the same description in his possession at the time he is apprehended, or having previously passed the like forgeries to the prosecutor or others. Where the prisoner, in passing a forged bill of exchange, purporting to be drawn by James Heastings upon Sir James Esdaile & Co., bankers, London, was asked whether he knew Heastings the drawer, and he said he did, he was a merchant in Liverpool, but he did not know much of him; and being then asked whether he knew Higgins the payee, he said he knew him well, that he kept a large cotton warehouse in Manchester, and that he received the bill from him for printing calicoes for him; the bill was refused acceptance and returned, and several attempts were then made to apprehend the prisoner, but without success, for several months; being at last taken, and indicted for uttering this bill as a forgery, the above facts were proved, and also that after various searches and inquiries it was ascertained that no such person as James Heastings resided at Liverpool, and that no person of the name of Peter Higgins kept a cotton warehouse at Manchester, but there had been a person of that name there, a weaver, who was then a prisoner in Lancaster Castle, under a charge of forgery; when the prisoner was apprehended, three bills of exchange were found upon him, all drawn upon Sir James Esdaile & Co., one drawn in the name of Newman, and the other two in the name of Walters; these were given in evidence (although objected to as being the subject of a distinct charge) to prove the guilty knowledge, and a clerk from Sir James Esdaile's proved that no such person as Heastings, Newman, or Walters were customers of that house: the prisoner was found guilty, and the case being reserved for the opinion of the judges, they held the conviction to be right; that the evidence was quite sufficient to support the conviction, for uttering the bill knowing it to be forged; and that the other bills on the same house, found upon the prisoner on his apprehension, were properly admitted as evidence of his guilty knowledge. *R. v. Hough, R. & Ry.* 120. So, where persons were indicted for uttering a forged Bank of England note, knowing it to be forged, *Ld. Ellenborough, C. J.*, admitted evidence of their having previously passed other forged notes to other persons, as proof of their guilty knowledge; and the judges held that the evidence was properly admitted. *R. v. Wylie et al., 2 New Rep.* 92. So, where upon an indictment for forging and uttering a Bank of England note, which appeared to have been done with a camel-hair pencil, the prosecutor, for the purpose of proving guilty knowledge, tendered in evidence another note, forged in the same manner, with the same materials, uttered by the prisoner three months before, and two 101.

notes, and thirteen 11. notes of the same fabrication, from the files of the Bank, (but when received by them did not appear), all of which had the prisoner's handwriting on the back : the judge received the evidence, subject to the opinion of the judges as to its admissibility ; and the judges afterwards held that they were admissible for the purpose, subject however to observations as to the weight of the evidence, which would be more or less considerable, according to the number of the other notes, the distance of time at which they were put off, the situation in life of the prisoner, so as to make it more or less probable that so many notes should pass through his hands in the regular way of business. *R. v. Ball, R. & Ry.* 132. But where the uttering of other forged notes was at the time the subject of a distinct prosecution, Vaughan, B., refused to allow them to be given in evidence for this purpose. *R. v. Thomas Smith, 2 Car. & P.* 638. And in another case, where the other notes offered in evidence, were uttered subsequently to that which was then the subject of prosecution, Gaselee, J., was disposed to receive the evidence, but said he would reserve the point for the opinion of the judges ; and the counsel for the prosecution, deeming the case to be sufficiently proved without it, did not press the evidence. *R. v. Frederick Smith, 4 Car. & P.* 411. But where the proof was of several other notes passed by the prisoner from time to time, and which were returned to him as forgeries, but were not proved on the trial to be so, the judges held that the evidence ought not to have been admitted, and recommended the prisoner for a pardon ; some of the judges seemed to think, that as the other notes were of a different description and denomination from that on which he was indicted, they ought not to have been given in evidence, even if they had been proved to have been forgeries. *R. v. Millard, R. & Ry.* 245.

3. *The Instrument Forged.*

Forgery is the making of a false written instrument, which on the face of it appears to be good and valid for the purpose for which a genuine instrument of the same nature would have been created, with intent to defraud some person or persons. Therefore where upon an indictment for forging and uttering a navy pay bill, and for forging and uttering an indorsement on it, it appeared that the bill was payable to —, or order, a blank being left for the payee's name: the prisoner was convicted ; but the point being reserved for the opinion of the judges, they held the conviction to be wrong ; they held that it was not a bill of exchange, because there was no payee. *R. v. Randall, R. & Ry.* 195. And the same point has been decided, upon an indictment for

forging a cheque or order for the payment of money. *R. v. Richards, R. & Ry.* 193. Where the prisoner was indicted for forging a note, purporting to be a bank of England note, but signed "For self and company, of my bank in England," it was holden that he could not be convicted. *Jones's case, 2 East, P. C.* 883. Where a writing purporting to be a bill of exchange, was, "Please pay to your order," &c. : *Erskine, J.*, held that it was not a bill of exchange within the statute against forgery. *R. v. Bartlett, 2 Mo. & R.* 362. So, where a country bank-note for one pound, originally signed, "For Barnard, Barnard, and Green, Thomas Barnard," was altered by the prisoner into a note for forty pounds, but he cut off the name, "Thomas Barnard": being indicted for the forgery, the judges held that he could not be convicted; for as it had no signature, it was not a promissory note. *R. v. Pateman, R. & Ry.* 455. So, where an order for the payment of money, signed by a prisoner in his own name, was not addressed to any person, but at the bottom of it were written the words, "Payable at Messrs. Masterman & Co., White Hart-court, Wm. M'Inerheney": a majority of the judges held that this was not an order for payment of money, and that the prisoner ought not to be convicted. *R. v. Ravenscroft, R. & Ry.* 161. But where a bill of exchange was not addressed to any person, but a forged acceptance was written across it purporting to be signed by William Sellers, this was holden by all the judges except three, to be so far complete as a bill of exchange, as to be punishable as a forgery. *R. v. Hawkes, 2 Moody,* 60.

But if the instrument be complete, it is not necessary, if it be a negotiable instrument, that it should be in a negotiable state, to render a party punishable for forging or uttering it. Where a forged bill was payable to the drawer's order, and upon the prisoner getting it discounted, he indorsed it in a feigned name, but there was no indorsement in the name of the drawer: the prisoner being convicted, a majority of the judges held the conviction to be right. *R. v. Wicks, R. & Ry.* 149. Where a bill is payable to two or more persons, forging the indorsement of one of them is punishable under the statute. *R. v. Winterbottom, 2 Car. & K.* 37. Where a forged bill was payable to the prisoner himself, and he deposited it (but without indorsing it) with a person to whom he owed a less sum, as a security, until he should pay him: the prisoner being convicted, the judges held the conviction to be right. *R. v. Birkett, R. & Ry.* 86.

In cases where the genuine instrument, to be valid, must be stamped, it is not necessary that the forged instrument should be on a sufficient stamp, or indeed stamped at all. *Hawkswood's case, 2 East, P. C.* 955. *Morton's case, Id.* Where the forgery consisted of an alteration in a country banker's bill, re-issued without a fresh stamp, which by

law was requisite to its validity : this being objected to upon a trial for the forgery, and the point reserved for the opinion of the judges, they were unanimously of opinion that the prisoner ought to be convicted ; that although the bill was not valid, for the reason above mentioned, yet it was the same thing as forging a bill upon a wrong stamp, which before had been decided to be a capital felony. *R. v. Teague, R. & Ry.* 33.

Upon an indictment for forging an instrument, or for uttering it knowing it to be forged, the instrument itself must be produced, if it be in the possession of the prosecutor. If it be in the possession of a third party, he must be served with a subpoena *duces tecum*, to produce it, if not already bound over by recognizance ; or if it be in the possession of the prisoner, notice should be given to him to produce it ; and if it be not produced at the trial, then, upon calling the witness on his subpoena or recognizance, or upon proof of service of the notice on the prisoner, the prosecutor may give secondary evidence of it. So, if it be proved to have been destroyed—or proved to be lost, and that diligent search has been made for it, and that it cannot be found,—secondary evidence may be given of it. *See ante*, p. 137. Where a bill of indictment was preferred for the forgery of a deed, and the grand jury stated to the judge that they were informed that the deed alleged to be forged was in the possession of the defendant, and asked whether they could return a true bill if the deed were not produced before them ; the judge (Park, J.) told them that if the deed, from being in the possession of the prisoner, or from any other sufficient cause, could not be produced before them, they might receive secondary evidence of its contents. *R. v. Hunter, 8 Car. & P.* 591. The case was tried at the following assizes, and upon that occasion, notice was given to the prisoner to produce the deed ; it was proved that his attorney had given it in evidence in an ejectment, as part of his title, and had afterwards received it back : and Vaughan, B., held that on the prisoner's counsel refusing to produce it, this was sufficient to let in secondary evidence of its contents. *R. v. Hunter, 4 Car. & P.* 128. Where upon an indictment for forging a deed, it was proposed to give secondary evidence of it, upon the ground that it was in possession of the prisoner, and he had notice to produce it ; but it appearing that the assizes had commenced before the notice was given, Parke, J., held that it was not sufficient, as it ought to have been given a reasonable time before the assizes : it was then proved that the prisoner, on an examination on oath upon another occasion as a witness before a magistrate, stated that he had had the deed in question, but that thinking it of no value, he burnt it ; the admission of this examination as evidence was objected to, on the ground of its being on oath ; but as the prisoner at the time was not charged with this offence, Parke,

J., admitted it, and held that the prosecutor was then entitled to give secondary evidence of the deed; the secondary evidence was a copy of the deed, but as the person who made it said that he had never examined it with the original, Parke, J., said, that under these circumstances there could hardly be a satisfactory conviction; and the prisoner was accordingly acquitted. *R. v. Haworth*, 4 Car. & P. 254. In a case in a note in East's Reports (*How v. Hall*, 14 East, 276 n.), Ld. Ellenborough, C. J., said, "I remember an indictment tried before the late Mr. Justice Buller, against a man of the name, I think, of Spragge, for forging a note, which he afterwards got possession of and swallowed; and parol evidence was permitted to be given of the contents of the note, though no notice to produce it had been given; but then indeed it might be said that such a notice would be nugatory, as the thing itself was destroyed."

If there be any variance between the instrument produced and that stated in the indictment, as for instance, if it be stated to be a promissory note, and it be in law a bill of exchange, although this would formerly be a fatal variance, *R. v. Hunter*, R. & Ry. 511, it may now be remedied by amending the indictment. 14 & 15 Vict. c. 100, s. 1, *ante*, p. 100.

I shall now proceed to make a few observations on the different instruments, the forgery and uttering of which are punishable by stat. 1 W. 4, c. 66, and subsequent statutes.

Bank of England note, or bank-post bill; 1 W. 4, c. 66, s. 3. 1 Vict. c. 84, s. 2; may be described in the indictment, as "a certain bank of England note," or "a certain bank-post bill," without stating the amount, or further describing the particulars. See 14 & 15 Vict. c. 100, s. 5, *ante*, pp. 89, 90. The forgery may be proved by any of the bank inspectors, or by any person acquainted with the handwriting of the signing clerk, without calling the latter. *By the judges*, R. & Ry. 378. Besides the forgery and uttering of bank of England notes and post-bills, the following offences are also punishable by stat. 1 W. 4, c. 66:—buying or having forged bank-notes, s. 12;—making or having paper for forged bank-notes, or moulds for the same, ss. 13, 14;—making, having, or using plates for bank-notes, or the blank notes, ss. 15, 16; and see 14 & 15 Vict. c. 100, s. 6, *ante*, p. 90.

Bankers' notes; see "Bills of exchange or promissory notes," *infra*. Making or using the paper or moulds for such notes, is punishable by stat. 1 W. 4, c. 66, s. 17;—making, using, or having plates for such notes, s. 18. And this latter section has been holden to extend to the forgery in this country of promissory notes, purporting to be notes of certain bankers in Canada, and is not confined to the notes of bankers in England. *R. v. Hannon*, 9 Car. & P. 11, 14, *by all the judges*.

Bill of exchange or promissory note; 1 W. 4, c. 66, s. 3. 1 Vict. c. 84, s. 2; may be described in the indictment as "a certain bill of exchange," or "a certain promissory note," without stating the date or amount, or by or on whom or in whose favour drawn, or any other particulars. See *ante*, p. 534. A bill drawn by A. upon B., requiring him to pay a certain sum at such a time after date "without acceptance," though not a very usual form, is still a bill of exchange within the statute. *R. v. Kinnear*, 2 Mo. & R. 117. But a bill or note under five pounds, is not punishable as a forgery, unless drawn in the form required by stat. 17 G. 3, c. 30. *Moffatt's case*, 2 East, P. C. 954. And a bill or note under twenty shillings is void; 48 G. 3, s. 88, s. 1; and not the subject of forgery. See *R. v. Fresh*, R. & Ry. 127, *ante*, 466. Where a promissory note was payable to Sarah Waller and Sarah Doubtfire, stewardesses of a provident society, or their successors in office; and it was objected that as the note, if genuine, would not be negotiable, it was not a promissory note within the meaning of the Act, but a mere engagement to be accountable to the stewardesses of the society for the time being, for a certain sum of money and interest: but the judges held it to be a promissory note within the meaning of the statute, and that the prisoner was properly convicted for forging it. *R. v. Box*, R. & Ry. 300.

Bond; 1 W. 4, c. 66, s. 10; may be described in the indictment as "a certain bond," without stating the amount or date, or the name of the alleged obligor or obligee, or any other particulars. See 14 & 15 Vict. c. 100, s. 5, *ante*, pp. 89, 90.

Cheque, see "Order for the payment of Money," *post*, p. 558.

Court roll, or copy of court roll relating to any copyhold or customary estate; 1 W. 4, c. 66, s. 10; may be described in the indictment as "a certain [copy of a] court roll," without naming the manor, or the property to which it relates, or whether it contains an entry of an admittance or surrender, &c. See 14 & 15 Vict. c. 100, s. 5, *ante*, pp. 89, 90.

Deed; 1 W. 4, c. 66, s. 10; may be described in the indictment as "a certain deed," without stating what species of deed, or the parties to it, or the purport of it, or otherwise describing it. See 14 & 15 Vict. c. 100, s. 5, *ante*, pp. 89, 90.

East India bond; 1 W. 4, c. 66, s. 3. 1 Vict. c. 84, s. 2; may be described in the indictment as "a certain East India bond."

Exchequer bill; 1 W. 4, c. 66, s. 3. 1 Vict. c. 84, s. 2; may be described in the indictment as "a certain exchequer bill." Making or having any instrument or machinery for making the paper for exchequer bills, or plates, &c. is punishable by stat. 5 & 6 Vict. c. 66, s. 9.

Foreign instruments, that is to say, any written instrument

purporting to be made out of England, the forging or uttering of which would be punishable under stat. 1 W. 4, c. 66, if it purported to be an English instrument,—forging or uttering such foreign instrument in England, is punishable in the same manner as if it purported to be made in England. 1 W. 4, c. 66, s. 30. Engraving or using plates for bills of exchange, promissory notes, undertakings or orders for the payment of money, of any foreign prince or state, or bankers, &c., without authority, is punishable by stat. 1 W. 4, c. 66, s. 19.

Funds: forging, altering, or uttering transfers of stock, powers of attorney, &c., 1 W. 4, c. 66, s. 6. 1 Vict. c. 84, s. 1; forging the attestation to such power of attorney, or uttering the same; 1 W. 4, c. 66, s. 8;—falsely personating the owner of stock; 1 W. 4, c. 66, s. 6. 1 Vict. c. 84, s. 1;—making false entries in the books of the public funds, or altering the entries therein; 1 W. 4, c. 66, s. 5. 1 Vict. c. 84, s. 1; making out false dividend warrants. 1 W. 4, c. 66, s. 9.

Order, warrant, or request for the delivery or transfer of goods, or for the delivery of any note, bill, or other security for the payment of money; 1 W. 4, c. 66, s. 10; may be described in the indictment as “a certain order for the delivery of goods,” &c., or “a certain order for the transfer of goods,” or “a certain request note for the delivery of goods,” &c. The words of the statute are, “warrant, order, or request:” warrant seems to mean a written authority to some servant or agent in whose custody the goods, &c., are, for the delivery or transfer of them:—“order” is nearly of the same import, and implies that the party making it has a right to command what he orders, and that the party to whom it is directed has no option whether he will comply with it or not;—but the word “request” implies that it is optional with the party to whom it is sent, to comply with it or not, such as an order for goods to a shopkeeper, or the like. Where it is a request merely, it seems that an indictment describing it as “a warrant, order, and request,” would be bad. *R. v. David Williams*, 20 *Law J.* 106 m. A tasting order, that is, an order from a merchant having wine in bond, directing the warehouse keeper to permit a person to taste it, is an order for the delivery of goods, within the meaning of the statute. *R. v. Illidge*, 2 *Car. & K.* 871. A request note may be, and usually is, by a person who has no interest in the goods he desires to be delivered. *R. v. James*, 8 *Car. & P.* 292. Where it was in this form: “Mr. Turner, please let the lad have a hat about nine shillings, and I will answer for the money; Ed. Barrett,”—and it was objected that it was a guarantee, and not an instrument within the Act: Gurney, B., held that although it purported to guarantee the price of the hat, still it was also a request for the delivery of it; and

the prisoner was convicted. *R. v. White*, 9 Car. & P. 282. And see *R. v. Thomas*, 7 Car. & P. 851. And an order or request note may be the subject of an indictment for uttering, although it be not addressed to any person; where in such a case, after conviction, this point was reserved for the opinion of the judges, they held the conviction to be right. *R. v. Ross Carney*, Ry. & M. 351. So, where a request note was thus:—"Aug. 3, —39.—One sixteen-inch helmet scoop, one four-quart kettle, James Haywood," this was holden by all the judges to be a request for the delivery of goods within the statute, although it was not addressed to any person. *R. v. Pulbrook*, 9 Car. & P. 37. So, where a request note set out a list of names, with a certain sum apposite to each, and was signed by the prosecutor; this, by a course of dealing between the prosecutor and a grocer in the town, was treated by the grocer as an order to give the persons therein named goods in the way of his trade to the amount of the sums opposite their respective names; and the defendant was charged with forgery of it, by altering the sum opposite to his own name from 5s. to 15s.: it was holden that although this was not a request for the delivery of goods upon the face of it, yet that evidence of the course of dealing was admissible to show that it was so; and the prisoner was convicted. *R. v. Walters*, Car. & M. 588. So, where a silversmith's order to the warden and company of goldsmiths, for plate which had been sent to be assayed and marked, was in form thus: "Sept. 23rd, 1764.—Sir, please to deliver my work to the bearer. Lydia Bell, Fleet-street, London," and this was proved to be the usual form: the case, after a motion in arrest of judgment, on the form of the order, was reserved for the opinion of the judges, who held the conviction to be right. *Jones's case*, 2 East, P. C. 941.

Order for payment of money; 1 W. 4, c. 66, s. 3. 1 Vict. c. 84, s. 2; if on a banker, it may be described in the indictment as "a certain cheque and order for the payment of money;" if on any other person, as "a certain order for the payment of money." It is to be remarked, that the statute makes no mention of a request for the payment of money, as it does with respect to the delivery of goods, as above mentioned; the words are merely "warrant or order for the payment of money." And therefore where the instrument appears upon the face of it to be a request merely, and not an order, it is not the subject of an indictment for forgery; *R. v. Roberts*, Car. & M. 652. *R. v. Thorn*. Id. 206. See *R. v. Baker*, Ry. & M. 231; in such case, if the money be paid upon it, the indictment should be for obtaining money by false pretences; see *ante*, p. 463; or if it have been tendered for payment, but the money not paid, the indictment may be for an attempt to obtain the money by false pretences. See *ante*,

p. 472. A warrant is an instrument which the drawer has a right to make, and which the drawee will be warranted in paying: as where goods were sold, and a forged bill of parcels of them was sent, with a written request to the buyer to pay the amount, as the seller was pressed for money,—this was holden to be a warrant for payment of money within the statute. *R. v. Dawson*, 20 *Law J.* 102 m. So, where an order on a banker was in this form,—“Messrs. Wilkins & Co., bankers, Merthyr, please to advance the bearer, Samuel Richards, the sum of 250*l.*, and place the same to my account; Morgan Thomas;” and it appeared that Morgan Thomas had a deposit account with the bankers, but not a drawing account; the instrument being described in the indictment as a “warrant and order” for the payment of money, Wightman, J., held that it was a warrant, but not an order; and as it was not both, he ordered the defendant to be acquitted. *R. v. Mary Williams*, 2 *Car. & K.* 51. But a cheque upon a banker may be described as a warrant and order, for it is both. *R. v. Crowther*, 5 *Car. & P.* 316. A cheque upon a banker, is a warrant or order for the payment of money within the meaning of the statute, even although it be post-dated, *R. v. Taylor*, 1 *Car. & K.* 213, or although the name of the pretended drawer be written across the instrument, instead of at the end of it. *R. v. Smith*, 1 *Car. & K.* 700. Where it was in this form,—“Mr. Johnson, Sir,—Please to pay to James Jackson the sum of 13*l.* by order of Christopher Sadler, Thornton-le-Moor, brewer, I shall see you on Monday;—your obliged, Chr. Sadler;” and at the foot were the words “The District Bank;” it appeared that Sadler was a customer of the bank, but there was no proof that he had any funds in the bank at the time, and it was therefore objected that this could not be deemed an order for the payment of money: the prisoner was convicted, the point was reserved for the opinion of the criminal appeal court, which held that the conviction was correct; and Parke, J., said that it was immaterial whether the alleged drawer had any funds in the bank or not, for if the cheque had been drawn in the name of a fictitious person, it would be a forgery, and the pretended drawer would of course have no funds in the bank; and as to the words “please to pay,” &c., it was only a civil way of addressing your banker, and did not prevent the instrument from being deemed an order. *R. v. Carter*, 2 *Car. & K.* 741. And a blank cheque, with a genuine signature, given to a clerk to fill up for a certain amount, who fills it up fraudulently for a larger sum, is as we have seen a forgery. *R. v. Wilson*, 2 *Car. & K.* 527, *ante*, p. 539. But where the cheque was “Please to pay to —, or order,” the judges held that a person charged with forging it, ought not to be convicted, as the instrument was not complete for want of a

payee. *R. v. Richards, R. & Ry.* 196. So, where it was not directed to any person, but merely the words "payable at Messrs. Masterman & Co., White Hart Court, Wm. M'Inerhoney," were written at the left corner at bottom, a majority of the judges held that this was not an order for the payment of money. *R. v. Ravenscroft, R. & Ry.* 161. But a banker's receipt for money deposited with him, if the depositor's name be forged upon it so as to enable the forger to demand the money back from the banker, *R. v. Atkinson, Car. & M.* 325, or accompanied by a forged memorandum in the name of the depositor, stating that the bearer is authorized to receive the money, *R. v. Harris and Lloyd, 1 Car. & K.* 178, is an order for the payment of money within the Act. So, a letter of credit from a house abroad upon a banker in this country, is an order for the payment of money within the Act. *R. v. Raake, 8 Car. & P.* 626. So, an instrument in this form,—
 "Mr. Martin will be pleased to send by the bearer 10*l.* on Mr. Hodge's account, as Mr. Hodge is very bad in bed and cannot come himself; Martin Ralph, foreman, St. Austel foundry,"—
 —was held to be an order for payment of money within the Act, although the person to whom it was directed was only the banker's clerk, and the person by whom it purported to be drawn had no authority from Hodge to draw on his bankers. *R. v. Vivian, 1 Car. & K.* 719. So, where the instrument was in this form,—
 "Oct. 11, 1839. This is to satisfy that R. Rogers as swept the flues, and cleaned the bilges, and repaired four bridges of the Princess Victoria; 4*l.* 10*s.* J. Nicholson,"—and it appeared that if the document were genuine, it would entitle the prisoner to payment on being presented, and the amount was in fact paid to him: this was held by Parke, B., and Bosanquet, J., to be an order for the payment of money within the Act. *R. v. Rogers, 9 Car. & P.* 41. So, where the order was "to pay on demand to Mr. Hugh Young, or order, all my proportion of prize money, due to me for my service on board His Majesty's ship *Leander*,"—signed "John Johnson by his mark," and directed to Alexander Davison, Esq.: it was objected that this could not be deemed an order for the payment of money, as no particular sum was mentioned in it; but the prisoner being convicted, the judges held the conviction to be right. *McIntosh's case, 2 East, P. C.* 942. Where the instrument forged, purported to be an order of a justice of the peace upon the treasurer of the county, to pay John Cox a certain sum, the expense of burying a dead body which had been cast on shore (and which orders justices are authorized by statute to make in favour of parish officers, to reimburse them for such expenses): five of the judges held this not to be an order for the payment of money, because it did not appear on the face of it that John Cox was a parish officer; six of the judges, however, held that

it was, and properly the subject of an indictment for forgery, *R. v. Froud, R. & Ry.* 389. So, a forged pass of a discharged prisoner, enabling him to receive certain sums from the overseers of the poor of the different parishes, he would have to pass through on his route to the place of his settlement, is an order for the payment of money within the Act; and where a woman presented to an overseer such a forged pass, which directed the money to be paid to Wm. Henry, on his giving a receipt, she was held guilty of uttering it. *R. v. Macdonald, 1 Car. & K.* 374. But where a forged instrument, purporting to be an order of justice of the peace for a certain sum for apprehending vagrants, was not under seal, and was directed to the treasurer of the county, when by statute it should have been under seal, and directed to the high constable, Hayley, J., directed and acquitted; and the judges held that he was correct in doing so. *R. v. Rushworth, R. & Ry.* 313.

Receipt for money or goods, or an accountable receipt for money or goods, or for any debt, bill, or other security for payment of money; id. *W. & C.* 66, A. 10; may be described in the indictment as "a certain receipt for money," or "a certain receipt for goods," or as "a certain accountable receipt for money," &c. It is not necessary that it should be in any particular form of words; any words which indicate that the party whose name is forged has received the money, such as "settled," *R. v. Martin, Ry. & M.* 483. And see *R. v. Thompson, 2 Leach*, 310,—"paid," *R. v. Houseman, 8 Car. & P.* 189,—"received" or "recd.," see *R. v. Barton, Ry. & M.* 141,—"received from Mr. Benden, due to Mr. Waxman, 17s. 6d. settled," *R. v. Iden, 2 Car. & K.* 635,—"18l. 15s. 6d. for the high constable, James Hughes," *R. v. Boardman, 3 Mo. & R.* 147, &c.—have all been held to be receipts, within the meaning of the Act. But where the instrument was in this form,—"Wm. Chinnery, Esq. paid to X. Tomsen, the sum of eight pounds, Feb. 12, 1812," without any name subscribed to it; and it was proved that the prisoner gave it to Mr. Chinnery's housekeeper, as the receipt of Thomas Thompson; the judges held that this was not a receipt, within the meaning of the statute; it was an assertion that Chinnery had paid the money, but did not import an acknowledgment thereof by Thompson. *R. v. Harvey, R. & Ry.* 227. And where the indictment charged the defendant with forging a receipt for the payment of money, and the receipt was on the back of an order for payment of money, thus,—"received for R. Aickman G. Arscott," the latter being the prisoner's real name; Bolland, B., and Littledale, J., held this not to be a forged receipt for the payment of money. *R. v. Arscott, 6 Car. & P.* 408. Also, a railway scrip certificate was held not to be a receipt within the meaning of the Act.

R. v. West, 2 Car. & K. 496. So, where it was the practice of the treasurer of a county, in paying orders for the expenses of witnesses, to require the witnesses to sign their names on the back of the order, and opposite to them the sums they were entitled to receive; and the prisoner being indicted for forging one of these names,—“James Oakes, 1*l.* 10*s.*,”—as a receipt, Erie, J., (after consulting Coleridge, J.), held that this was not a receipt or acquittance for money, and directed an acquittal. *R. v. Cooper*, 2 Car. & K. 586.

As to the uttering of a forged receipt;—where the prisoner exhibited a forged receipt to a person who called for payment of an account, but refused to part with it out of his hand: this was holden to be an uttering of the receipt. *R. v. Radford*, 1 Car. & K. 707. So, where the navy board employed one Collinridge to do certain work, and he employed several persons to do different parts of the work for him; Collinridge died, but the work being completed, the prisoner, in order to get Collinridge's accounts passed at the navy board (which he was employed to do) forged receipts of these different persons as to Collinridge, and produced them to the navy board as vouchers to accompany and verify Collinridge's account: being indicted for uttering these receipts, it was objected that as these persons were employed by Collinridge, and to be paid by him or his executors, the navy board had nothing to do with them; and that therefore exhibiting these receipts to the navy board was not an uttering of them within the statute; the prisoner was however convicted and the judges held the conviction to be right. *Thomas's case*, 3 East, P. C. 934.

As to the forgery of receipts by altering them:—where the paymaster of a detachment of artillery was in the habit every month of giving receipts for subsistence money for the detachment, as received from Cox & Co., for which the pay serjeant usually got cash from some of the tradespeople at Woolwich; he issued a receipt for May, and gave it to the prisoner, who was pay serjeant, and he, for a fraudulent purpose, altered the word “May” to “June,” and passed the receipt to a tradesman at Woolwich, who got cash for it from Cox & Co.: being indicted for the forgery, it was objected that it was in effect an order for the payment of money, and not a receipt, and should have been so described in the indictment; but he was convicted, and a majority of the judges held the conviction to be right. *R. v. Hope*, Ry. & M. 414. So, where a high constable issued his precept to the overseers of a parish, to pay 3*l.* 5*s.* 9*d.* as their proportion of the county rate, and the sum being paid to him by the prisoner, he wrote his receipt at the foot of the precept, thus,—“recd. the above rate, J. Powell;” the prisoner afterwards altered the sum in the precept to 3*l.* 15*s.* 9*d.*, produced it to the auditor of the union, and obtained from him the latter sum: being indicted

for this as for forging the receipt, it was objected that there was no forgery or alteration of the receipt, but the alteration was in the precept: but it was holden that as the altering of the figures in the precept had the effect of altering the sum for which the receipt was given, it was clearly a forgery of the receipt. *R. v. Vaughan*, 8 Car. & P. 276.

Recognizance, cognovit, judgment, or deed enrolled,—acknowledging, in the name of another, is punishable by stat. 1 W. 4, c. 66, s. 11.

Registers of baptism, marriage, or death,—making false entries in them, or forging, or uttering a licence of marriage, is made punishable by stat. 1 W. 4, c. 66, s. 20.

Seals: forging the great seal of the United Kingdom, the privy seal, privy signet, or sign manual, the seals appointed by the 24th article of the union with Scotland, the great seal of Ireland or the privy seal of Ireland,—treason; 1 W. 4. c. 66, s. 2;—transportation for life, or not less than seven years, or imprisonment, with or without hard labour, for not more than four nor less than two years. 1 Vict. c. 84, s. 1.

Seal of a corporation, forging, 8 & 9 Vict. c. 113, s. 4.

Undertaking for the payment of money; 1 W. 4, c. 66, s. 3. 1 Vict. c. 84, s. 2; may be described in the indictment, as “a certain undertaking for the payment of money.” A written promise to pay A. 100*l.* or such other sum as he should incur by reason of his being surety to the sheriff for C. D., has been holden to be an undertaking within the Act. *R. v. John Reed*, 8 Car. & P. 623. So, a guarantee that another would pay for goods to be sold to him by the prosecutor, although an undertaking for payment by another, was holden by the judges to be an undertaking for payment of money within the Act. *R. v. Stone*, 2 Car. & K. 364. 1 Den. 181.

Will, testament, codicil, or testamentary writing; 1 W. 4, c. 66, s. 3. 1 Vict. c. 84, s. 2; may be described in the indictment as “a certain will,” or “a certain will and testament,” or “a certain codicil to a will,” without saying of whom, or the date, or other particulars. See 14 & 15 Vict. c. 100, ss. 5, 7, *ante*, pp. 89, 90. “Forgery may be committed of the will of a person who is alive; *Coogan’s case*, 2 East, P. C. 948; or the will of a person who never existed. *R. v. Avery*, 8 Car. & P. 596. Where, upon an indictment for forging a will, the prosecutor, in the course of his evidence, put in and proved the probate; and it was thereupon objected for the prisoners, that this, whilst unrevoked, was conclusive evidence that the will was genuine and valid: but Garrow, B., overruled the objection; and the prisoners being convicted, the judges held the conviction to be right. *R. v. Buttery and McNamarra*, R. & Ry. 342. As to witnesses for the prosecution, see *R. v. Hayward et al.*, 2 Car. & K. 234. *R. v. Farley et al.*, Id. 313.

As to forgery at common law, see 2 *East*, P. C. 859—864. A railway pass is an instrument, which may be the subject of forgery at common law; *R. v. Boulton*, 2 Car. & K. 604; but it seems that to make the uttering an offence at common law, some fraud must have been actually effected by it. *Id.*

CHAPTER II.

Offences against the Queen and her Government.

1. *Treason, under stat. 25 Ed. 3, st. 5, c. 2.*

Indictment.

— } The jurors for our Lady the Queen, upon their
to wit. { oath present, that A. B., being a subject of our
said Lady the Queen, on the — day of —, in the year of
our Lord —, and on divers other days as well before as
after, did, together with divers other persons to the jurors
aforesaid unknown, traitorously compass and imagine [*“com-
pass or imagine”*] the death of our said Lady the Queen;
and the said treasonable compassing and imagining did then
traitorously express, declare, and evince by divers overt acts
hereinafter mentioned, that is to say:—

In order to fulfil, perfect, and effectuate his said most evil
and wicked treason, and treasonable compassing and imagin-
ing aforesaid, he the said A. B., and the said several persons
aforesaid, on —, traitorously did meet and consult together
about the means of deposing Her said Majesty from her regal
style and dignity of Queen of the united kingdom of Great
Britain and Ireland:

And in order further to fulfil, perfect, and effectuate his
said most evil and wicked treason, and treasonable compassing
and imagining aforesaid, he the said A. B., and the said
several persons aforesaid, on —, traitorously did meet and
consult together about the traitorously levying of war against
our said Lady the Queen in her realm, to oblige Her said
Majesty to change certain measures of her government:

And in order further to fulfil, perfect, and effectuate his
said most evil and wicked treason, and treasonable compass-
ing and imagining aforesaid, he the said A. B., and the said
several persons aforesaid, on —, with a great multitude of
people armed and arrayed in a warlike manner, traitorously
did levy war against our said Lady the Queen in her realm:

And in order further to fulfil, perfect, and effectuate his

said most evil and wicked treason, and treasonable compassing and imagining aforesaid, he the said A. B., on —, traitorously was adherent to the enemies of our said Lady the Queen, to wit, to the —, giving them aid and comfort in Her said Majesty's realm, and did then traitorously hire and enlist divers, to wit, — men, and then did traitorously send them to —, for the purpose of aiding and assisting the said enemies of our Lady the Queen :

And in order further to fulfil, perfect, and effectuate his said most evil and wicked treason, and treasonable compassing and imagining aforesaid, the said A. B., on —, traitorously did incite and endeavour to persuade the said enemies of our said Lady the Queen, to wit, the —, to invade Her said Majesty's realm :

And in order further to fulfil, perfect, and effectuate his said most evil and wicked treason, and treasonable compassing and imagining aforesaid, the said A. B., on —, traitorously did write and publish a certain treasonable letter and libel, of and concerning —, and which said letter and libel was and is as follows, that is to say, —, with intent thereby then to —

Contrary to the duty of his allegiance, against the form of the statute in such case made and provided, and against the peace of our Lady the Queen, her crown and dignity. [*Overt acts must be laid, as in the above form. See as to the indictment generally, Arch. Dig. Pl. Cr. 637—646. And as to the venue, see ante, p. 72. A copy of the whole indictment must be delivered to the prisoner (his attorney or agent requiring the same) ten days at least before his trial, and in the presence of two or more credible witnesses, 7 Ann c. 21, s. 1; which means before his arraignment, Post 220; and which ten days are reckoned exclusive of the day of the delivery of it, and the day of the arraignment. Id. 220. The bill must be preferred and found within three years after the offence committed. 7 & 8 W. 3, c. 3, s. 5. But these provisions in stat. 7 & 8 W. 3, and 7 Ann shall not apply to cases, where the overt act laid shall be any attempt to injure in any manner the person of the Queen 8 & 9 W. 3, c. 51, s. 1.*]

Arraignment and plea } As to the arraignment, see ante, p. 104. Formerly if upon arraignment the prisoner stood mute, it was equivalent to a conviction by verdict, and sentence was passed upon him. 7 & 8 W. 3, c. 3, s. 2. And see Arch. Dig. Pl. Cr. 646. But now the court, if it think fit, may order a plea of not guilty to be entered, 7 & 8 G. 3, c. 24, s. 2, ante, p. 101, and which in practice is always done. If the prisoner plead guilty, of course nothing remains but to pass sentence upon him. See 7 & 8 W. 3, c. 3, s. 2.

Jury and witnesses.] By stat. 7 Ann. c. 21, s. 11, a list of the witnesses to be produced on the trial, and of the jury,—mentioning the names, profession, and place of abode of such witnesses and jurors,—shall be given to the prisoner, in the presence of two or more credible witnesses, at the same time that the copy of the indictment is delivered to him. See also stat. 6 G. 4, c. 50, s. 21, to the same effect, as to the list of the jury. But this is not to extend to cases, where the overt act shall be any attempt to injure the person of the Queen. 5 & 6 Vict. c. 51, s. 1.

Evidence.] The evidence must be applied to the overt acts; and the prosecutor must prove one good overt act, at least, in the county in which the venue is laid, but he may prove the others to have taken place in any other county. 2 Hawk. c. 46, s. 184—189. And there must be “two lawful witnesses, either both to the same overt act, or one of them to one, and another of them to another overt act of the same treason,—unless the party indicted and arraigned or tried shall willingly without violence, in open court, confess the same.” 7 & 8 W. 3, c. 3, s. 2. As to evidence of an overt act of conspiring to levy war, see *Arch. Dig. Pl. Cr.* 468, 515;—of levying war, *Id.* 467, 497;—of adhering to the Queen’s enemies, *Id.* 470, 518;—of inciting foreigners to invade the country, *Id.* 472;—of treasonable writings, published, *Id.* 473;—of words of advice or persuasion to treason, *Id.* 475. The prisoner also must be proved to be a subject of Her Majesty. *Id.* 449—461.

Trial.] The prisoner may peremptorily challenge thirty-five jurors, without showing any cause. *Arch. Dig. Pl. Cr.* 671. *Ante*, p. 163. And formerly if he peremptorily challenged more, it was equivalent to a conviction. See 7 & 8 W. 3, c. 3, s. 2. But now, by stat. 7 & 8 G. 4, c. 28, s. 3, every peremptory challenge above the limited number, is void, and the trial may proceed, as if no such challenge had been made. See *ante*, p. 163. The trial in other respects is the same as in ordinary cases.

As to the sentence, see *ante*, p. 181.

Principals, &c.] All those who would be accessories before the fact in felony, are principals in treason. *Arch. Dig. Pl. Cr.* 582. So, all those who would be accessories after the fact in felony, are principals in treason; every instance of aid or protection, which in felony would render a man accessory after the fact, will in treason make him a principal. *Fost.* 341. 1 Hale, 239. 1 Hawk. c. 29, s. 3. *Arch. Dig. Pl. Cr.* 584. And those who procure, hire, or command, &c., are indicted, tried, &c., in every manner as principals in the first degree; 1 Hale, 238; but those who in felony would be

accessories after the fact, though principals in treason, are in fact treated merely as accessories in their progress to conviction, and the indictment must be special of the receipt, &c., as in felony. *Fost.* 341, 342. 1 *Hals.* 238.

Other Treasons.

Compassing, imagining, inventing, devising, or intending death or destruction, or any bodily harm tending to death or destruction, maim or wounding, imprisonment or restraint of the person, of Her Majesty, her heirs or successors,—such compassings, imaginations, inventions, devices, or intentions, or any of them, being expressed, uttered, or declared, by publishing any printing or writing, or by any overt act or deed. 36 *G.* 3, c. 7. 57 *G.* 3, c. 6. 11 *Vict.* c. 12, s. 1.

Compassing or imagining the death of the Queen Consort of a King, or of the eldest son of a King or Queen Regnant, is treason, by stat. 25 *Ed.* 3, st. 5, c. 2; *Arch. Dig. Pl. Cr.* 490, 493; compassing the death of the husband of a Queen Regnant, is not. *Id.* 491.

Violating the King's Companion (Queen Consort,) or the eldest daughter of the King (or Queen Regnant) unmarried, or the wife of the eldest son and heir of the King (or Queen Regnant). 25 *Ed.* 3, st. 5, c. 2. *Arch. Dig. Pl. Cr.* 495.

Levying war against our Lady the Queen in her realm. 25 *Ed.* 3, st. 5, c. 2. *Arch. Dig. Pl. Cr.* 497—517.

Being adherent to the enemies of our Lady the Queen in her realm, giving to them aid or comfort in the realm or elsewhere. 25 *Ed.* 3, st. 5, c. 2. *Arch. Dig. Pl. Cr.* 518—528.

Slaying the chancellor, treasurer, the Queen's justices of the one bench or the other, justices of assize, and all other justices assigned to hear and determine, being in their places, doing their offices. 25 *Ed.* 3, st. 5, c. 2. *Arch. Dig. Pl. Cr.* 529—532.

Counterfeiting the Queen's great or privy seal; 25 *Ed.* 3, st. 5, c. 2; or the sign manual, privy signet, or privy seal. 1 *Mary*, Sess. 2, c. 6. But this is now punishable with transportation for life, or for not less than seven years; or imprisonment, with or without hard labour, for not more than four, nor less than two years. 1 *Vict.* c. 84, s. 1. *Ante*, p. 563.

*2. Felony against Her Majesty.**Indictment.*

— } The jurors for our Lady the Queen, upon their
to wit. } oath present, that A. B., on the — day of —,
in the year of our Lord —, and on divers other days and

times as well before as after, did, together with divers other persons to the jurors aforesaid unknown, feloniously compass, imagine, invent, devise, and intend to depose our most gracious Lady Queen Victoria from the style, honour, and royal name of the imperial crown of the United Kingdom; [*“to deprive or depose our most gracious Lady the Queen, her heirs or successors, from the style, honour, or royal name of the imperial crown of the United Kingdom, or of any other of Her Majesty's dominions and countries,—Or to levy war against Her Majesty, her heirs or successors, within any part of the United Kingdom, in order by force or constraint to compel her or them to change her or their measures or counsels, or in order to put any force or constraint upon, or in order to intimidate or overawe, both houses or either house of parliament,—Or to move or stir any foreigner or stranger with force to invade the United Kingdom, or any other dominions or countries under the obedience of Her Majesty, her heirs or successors;”*] and the said compassing, imagination, invention, device, and intention did then feloniously express, utter, and declare, by [publishing divers printings and writings, and by open and advised speaking, and by divers overt acts and deeds,] hereinafter mentioned, that is to say:

In order to fulfil, perfect, and effectuate his said most evil, wicked, and felonious compassing, imagination, invention, device, and intention aforesaid, he the said A. B., and the said several other persons aforesaid, on ———, feloniously did publish and cause to be published a certain printed paper according to the tenor and effect following, that is to say: [*here set out the paper.*]

And in order further to fulfil, perfect, and effectuate his said most evil, wicked, and felonious compassing, imagination, invention, device, and intention aforesaid, he the said A. B., on ———, feloniously did openly and advisedly say to divers subjects of our said Lady the Queen [*here state any open and advised speaking, which may be an overt act of the felony.*]

And in order further to fulfil, perfect, and effectuate his said most evil, wicked, and felonious compassing, imagination, invention, device, and intention aforesaid, he the said A. B., and the said several persons aforesaid, on ———, feloniously did [*here set out any other overt acts, as in treason, ante, p. 564*]:

Against the form of the statute in such case made and provided, and against the peace of our Lady the Queen, her crown and dignity: [*The venue may be the same as in treason. See ante, p. 72. The indictment may charge any number of overt acts. 11 Viet. c. 12; s. 5. The defendant is not entitled to a copy of the indictment, or to a list of the*

witnesses or their respective addresses; but he will be allowed to inspect the indictment, and the names of the witnesses indorsed upon it. *R. v. Cuffey*, 12 Shaw's J. P. 648, 807.

Felony; transportation for life, or not less than seven years; or imprisonment, with or without hard labour, for not more than two years. 11 Vict. c. 12, s. 8. This is not to affect the stat. 25 Ed. 3, st. 5, c. 2, as to treason; *Id.* s. 6; nor shall the indictment be deemed erroneous, if any of the facts therein stated amount in law to treason, nor shall the defendant be acquitted if the facts proved amount to treason. *Id.* s. 7. Accessories before the fact, punishable as principals; and accessories after the fact, imprisonment, with or without hard labour, for not more than two years. *Id.* s. 8. No costs. *Id.* s. 10.

Limitation of prosecution.] It is provided by stat. 11 Vict. c. 12, s. 4, that no person shall be prosecuted for a felony under that Act, in so far as the compassings, &c., are expressed by open and advised speaking only, unless information of the same on oath be given before a justice of the peace within six days after the words spoken,—or unless a warrant for the apprehension of the person who spoke them be issued within ten days after the information,—nor unless the warrant issue within two years after the passing of the Act [22nd April, 1847.] So that now there cannot be any prosecution under this Act, where the compassing, &c., is evidenced by open or advised speaking only. But in all other cases, there seems to be no limitation to the prosecution.

Evidence.] The evidence is applied entirely to the proof of the overt acts, as in treason. By stat. 11 Vict. c. 12, s. 4, "no person shall be convicted of any such compassings, imaginations, inventions, devices, or intentions as aforesaid, in so far as the same are expressed, uttered, or declared by open or advised speaking as aforesaid, except upon his own confession in open court, or unless the words so spoken shall be proved by two credible witnesses."

3. *Attempt to Fire at, or do other Injury to, Her Majesty.*

Indictment.

— } The jurors for our Lady the Queen, upon their
to wit. } oath present, that A. B., on the — day of —,
in the year of our Lord —, did wilfully [attempt to] discharge a certain pistol near to the person of Her Majesty Queen Victoria ["wilfully discharge or attempt to discharge, or point, aim, or present at or near to the person of

the Queen, any gun, pistol, or any other description of fire-arms or of other arms whatsoever, whether the same shall or shall not contain any explosive or destructive material,—or shall discharge or cause to be discharged, or attempt to discharge or cause to be discharged, any explosive substance or material near to the person of the Queen,—or if any person shall wilfully strike or strike at, or attempt to strike or to strike at, the person of the Queen, with any offensive weapon, or in any other manner whatsoever,—or if any person shall wilfully throw or attempt to throw any substance, matter, or thing whatsoever at or upon the person of the Queen,—with intent in any of the cases aforesaid to injure the person of the Queen,—or with intent in any of the cases aforesaid to break the public peace, or whereby the public peace may be endangered,—or with intent in any of the cases aforesaid to alarm Her Majesty;—Or if any person shall, near to the person of the Queen, wilfully produce or have any gun, pistol, or any other description of fire-arms or other arms whatsoever, or any explosive, destructive, or dangerous matter or thing whatsoever, with intent to use the same to injure the person of the Queen, or to alarm Her Majesty,”] with intent thereby then to injure the person of Her said Majesty : against the form of the statute in such case made and provided, and against the peace of our Lady the Queen, her crown and dignity. [*There may be other counts, if necessary, varying the statement of the act done, and of the intent, as defined by the statute.*

High misdemeanor; transportation for seven years;—or imprisonment, with or without hard labour, for not more than three years, and to be publicly or privately whipped not oftener than thrice. 5 & 6 Vict. c. 51, s. 2. This is not to alter the punishment for treason or misprision of treason. Id. s. 3.

Evidence.

To maintain this indictment, it must be proved—

1. That the defendant did the act, stated in the indictment.
2. The intent as laid. This may be inferred from the nature of the act done, or from other facts or circumstances fairly indicating it.

CHAPTER III.

Offences of a Public Nature.

SECTION I.

*Offences relating to the Coin.*1. *Counterfeiting the Coin.**Indictment.*

— } The jurors for our Lady the Queen, upon their
to wit. } oath present, that A. B., on the — day of —,
in the year of our Lord —, feloniously did falsely make
and counterfeit one piece of coin, resembling and apparently
intended to resemble and pass for [*“any coin resembling or
apparently intended to resemble or pass for”*] certain of the
Queen's current gold coin called a sovereign [or silver coin
called a shilling]: against the form of the statute in such
case made and provided, and against the peace of our Lady
the Queen, her crown and dignity. [*As to the venue, see ante,
p. 78. Where a fourpenny piece was called a “groat” in the
indictment, and the proclamation was not proved by which
these coin were made current, the judge left it to the jury to
say whether a groat and a fourpenny piece were the same
thing, and they acquitted the prisoner. R. v. Connell,
1 Car. & K. 190.*]

*Felony; transportation for life, or not less than seven
years;—or imprisonment, [with or without hard labour,
s. 19] for not more than four years. 2 W. 4, c. 34, s. 3.*

Evidence.

To maintain this indictment, the prosecutor must—

1. Prove that the prisoner coined the piece of counterfeit
money in question, or was present aiding and abetting in the
coining of it. By stat. 2 W. 4, c. 34, s. 3, “every such offence
shall be deemed to be complete, although the coin so made
and counterfeited shall not be in a fit state to be uttered, or
the counterfeiting thereof shall not be finished or perfected.”

But it must be in such a state as to enable the jury to judge, whether it resembles, or was apparently intended to resemble or pass for the Queen's current coin, as stated in the indictment. And the Queen's gold or silver coin, shall be deemed to include and denote any gold or silver coin, coined in any of Her Majesty's mints, and lawfully current in any part of Her Majesty's dominions, whether within the United Kingdom or otherwise. *Id.* s. 21.

2. Produce the coin, and prove it to be counterfeit. By stat. 2 W. 4, c. 34, s. 17, it shall not be necessary to prove the coin to be false and counterfeit by the evidence of any moneyer or other officer of Her Majesty's Mint, but it shall be sufficient to prove the same to be false or counterfeit by the evidence of any other credible witness. In the country, at the assizes and sessions, the solicitor for the Mint, if present, or, in his absence, some silversmith, is usually the witness called for this purpose.

2. *Uttering Counterfeit Coin.*

Indictment.

— } The jurors for our Lady the Queen, upon their
to wit. } oath present, that A. B., on the — day of —,
in the year of our Lord —, did tender and utter ["tender,
utter, or put off"] to one C. D., one piece of false and counterfeit coin, resembling and apparently intended to resemble and pass for ["any false or counterfeit coin, resembling or apparently intended to resemble or pass for"] certain of the Queen's current silver coin called a half-crown [or gold coin called a sovereign]; he the said A. B., at the time he so tendered and uttered the said piece of false and counterfeit coin, well knowing the same to be false and counterfeit: against the form of the statute in such case made and provided, and against the peace of our Lady the Queen, her crown and dignity. [*As to the venue, see ante, p. 73.*

Misdemeanor; imprisonment [with or without hard labour, s. 19] for not more than one year. 2 W. 4, c. 34, s. 7.

Evidence.

To maintain this indictment, the prosecutor must prove—

1. The tendering or uttering in question by the prisoner, or that he was present aiding and abetting in the uttering. Where the indictment charged the prisoner with having "uttered and put off" a counterfeit shilling to one Danning,

not alleging that he "tendered" it, and the evidence was that he purchased some coffee and sugar at Dunning's shop, and in payment put down a counterfeit shilling on the counter; Dunning took it up, and told the prisoner that it was bad, upon which the prisoner walked out of the shop, leaving the shilling, and the coffee and sugar: the criminal appeal court held this to be an uttering; if a man offer base coin, whether it be accepted or not, it is an uttering. *R. v. Welch*, 20 *Law J.*, 101 m. The several cases given under the title "forgery," as to the uttering of forged instruments, may in a great measure be deemed authorities upon this subject. See *ante*, pp. 547—552. So, what is vulgarly called "ringing the changes," that is, where good money is given to a person in payment, and he returns instead of it a piece of counterfeit money, pretending it to be the same that was given to him, and declining to take it on account of its being bad: this has been held to be an uttering, within the meaning of the statute. *R. v. Franks*, 2 *Leach*, 736.

2. That the coin is counterfeit, as *ante*, p. 572. And any of the Queen's current coin, which shall have been gilt, silvered, washed, coloured, or cased over, or in any manner altered so as to resemble, or be apparently intended to resemble or pass for any of the Queen's current coin of a higher denomination, shall be deemed and taken to be counterfeit coin within the meaning of this Act. 2 W. 4, c. 34, s. 21.

3. That the prisoner knew the coin to be counterfeit. This must be inferred from the expressions or acts of the prisoner; see *ante*, p. 121; such as his having other base coin about him at the time; his having passed other counterfeit coin about the same time; or the like. The like evidence also, which has been ruled to be sufficient to prove a guilty knowledge in case of uttering a forged instrument, (*ante*, p. 550), will in general be good evidence of guilty knowledge in uttering counterfeit coin.

3. Uttering, and having other base Coin in his Possession.

Indictment.

— } The jurors for our Lady the Queen, upon their
to wit. } oath present, that A. B., on the — day of —,
in the year of our Lord —, did tender and utter [i.e., as in
the last form, to the words] well knowing the same to be false
and counterfeit; and that the said A. B., also at the time of
such tendering and uttering had then in his possession, besides
the piece of false and counterfeit coin so tendered and uttered

as aforesaid, one other piece of false and counterfeit coin resembling and apparently intended to resemble and pass for certain of the Queen's silver coin called a half-crown [or gold coin called a sovereign] : against the form of the statute in such case made and provided, and against the peace of our Lady the Queen, her crown and dignity. [*As to the venue, see ante, p. 73.*]

Misdemeanor ; imprisonment [with or without hard labour, s. 19] for not more than two years. 2 W. 4, c. 34, s. 7.

Evidence.

Prove the offence, as in the last case ; and then prove that the defendant, when he so uttered the base coin, had other base coin in his possession, as stated in the indictment. Or if two be acting in concert, and one tender the base coin, and the other have other base coin in his possession, both may be convicted of the offence, if the latter were present at the uttering, or so near as to be deemed a principal in the second degree in that part of the offence. Where two women were indicted for this offence, and it was proved that they both went to a baker's shop, and one went in and tendered a counterfeit shilling in payment of a loaf of bread, and was immediately apprehended, but upon being searched, no other bad money was found upon her ; the other, who had remained outside, ran away, but was pursued, apprehended and searched, and fourteen bad shillings were found upon her, wrapped together in a paper : being both indicted for the uttering, having at the time other counterfeit coin in their possession, Garrow, B., held that they were both principals in the uttering ; and as they acted in concert, one of them having other base coin in her possession, brought the case of both within the statute. *R. v. Priscilla and Eliza Skerrett*, 2 Car. & P. 427. See also *R. v. Gerrish*, 2 Mo. & R. 219. But where husband and wife were indicted for this offence, and it appeared clearly that they were acting in concert in passing bad money ; but upon the occasion in question, the woman alone, in the absence of her husband, passed a counterfeit shilling, but whether she had other bad money in her possession, was not known, as she was not then searched ; the husband however had base coin upon him at the time, and when they were apprehended the next day, a large parcel of counterfeit shillings was found upon the man, and six bad shillings of the same manufacture were found in possession of the woman : the judges held that the woman could only be convicted of the single offence of uttering the bad shilling, the man not at all. *R. v. Job and Sarah Elze*, R. & Ry. 142.

4. *Uttering Twice within Ten Days.*

Indictment.

— } The jurors for our Lady the Queen, upon their
to wit. } oath present, that A. B., on the — day of —,
in the year of our Lord —, did tender and utter [*&c., as in
the form, ante, p. 572, to the words*] well knowing the same
to be false and counterfeit; and that the said A. B. afterwards
and within ten days [*or on the same day*] of his so tendering
and uttering the said false and counterfeit coin aforesaid, to
wit, on —, did tender and utter to one E. F., one other
piece of false and counterfeit coin resembling and apparently
intended to resemble and pass for certain of the Queen's cur-
rent silver money called a shilling; he the said A. B., at the
time he so tendered and uttered the said last-mentioned piece
of false and counterfeit coin, well knowing the same to be false
and counterfeit: against the form of the statute in such case
made and provided, and against the peace of our Lady the
Queen, her crown and dignity. [*As to the venue, see ante,
p. 73. The two utterings must be stated in the same count,
to warrant the punishment assigned to this offence. Tandy's
case, 2 Leach, 833. R. v. Robinson, Ry. & M. 413.*]

*Misdemeanor; imprisonment [with or without hard
labour, s. 19] for not more than two years. 2 W. 4, c. 34,
s. 7.*

Evidence.

Prove the two utterings, in the same way as in the case of
one uttering, *ante*, p. 572.

5. *Uttering after a former Conviction.*

Indictment.

— } The jurors for our Lady the Queen, upon their
to wit. } oath present, that heretofore, to wit, at a sessions
of oyer and terminer and general gaol delivery [*or at the
general quarter sessions of the peace*], holden at —, in and
for the county of —, on the — day of —, in the year of
our Lord —, before — [*as in the record of the former
conviction; see ante, p. 193*], by the oath of twelve good and
lawful men of the county [*last*] aforesaid, then and there im-
panelled, sworn, and charged to inquire for our said Lady the
Queen, and for the body of the county, it was presented that

A. B., on —, did tender and utter [&c., so stating the record of the former conviction to the judgment inclusive, but in the past tense]: as by the record thereof more fully and at large appears; and which said judgment is still in full force and effect, and not in any manner reversed or made void. And the jurors first aforesaid, upon their oath aforesaid, do further present, that the said A. B., after being so convicted as aforesaid, afterwards, to wit, on [&c., as in any of the three preceding forms, but charging the offence to have been done "feloniously"]: against the form of the statute in such case made and provided, and against the peace of our Lady the Queen, her crown and dignity. [As to the venue, see ante, p. 73. Where in such an indictment, the statement of the former conviction did not conclude with a "probat per recordum," the judges held the indictment to be bad. *R. v. Turner*, Ry. & M. 47. But now by stat. 14 & 15 Vict. c. 100, s. 24, no indictment shall be deemed insufficient, for the omission of the words, "as appears by the record." See ante, p. 82.]

Felony; transportation for life, or not less than seven years;—or imprisonment [with or without hard labour, s. 19] for not more than four years. 2 W. 4, c. 34, s. 7.

Evidence.

To support this indictment, the prosecutor must prove—

1. The uttering, &c., as stated in the indictment. See the evidence in such of the three preceding cases as may be applicable.

2. The former conviction. The regular proof of this is, by an examined copy of the record. But by stat. 2 W. 4, c. 34, s. 9, a copy of the previous indictment and conviction, purporting to be signed and certified as a true copy by the clerk of the court or other officer having the custody of the records of the court, or his deputy, shall, upon proof of the identity of the person of the offender, be sufficient evidence of the previous indictment and conviction, without proof of the signature or official character of the person appearing to have signed and certified the same.

3. That the prisoner is the person who was so convicted; which is usually proved by the gaoler or other person who was present at his trial.

As to the mode of arraignment in this case, and the manner of charging the jury with the prisoner, see ante, p. 108.

C. Having Base Coin, with intent to utter it.

Indictment.

— } The jurors for our Lady the Queen, upon their to wit. {oath present, that A. B., on the — day of —, in the year of our Lord —, had in his custody and possession three ["three or more"] pieces of false and counterfeit coin, resembling and apparently intended to resemble and pass for certain of the Queen's silver current coin called a half-crown, with intent then to utter and put off the same; he the said A. B. then well knowing the same to be false and counterfeit: against the form of the statute in such case made and provided, and against the peace of our Lady the Queen, her crown and dignity. [*As to the venue, see ante, p. 73.*]

Misdemeanor; imprisonment [with or without hard labour, s. 10] for not more than three years. 2 W. 4, c. 34, s. 8.

Second offence, after a former conviction, felony; transportation for life, or not less than seven years;—or imprisonment [with or without hard labour, s. 10] for not more than four years. Id. The indictment for this second offence, may readily be framed from the last form.

Evidence.

To maintain this indictment, the prosecutor must prove—

1. That the prisoner had the coin mentioned in the indictment, or at least three pieces of it, in his custody or possession. And by stat. 2 W. 4, c. 34, s. 31, "where the having any matter in the custody or possession of any person, is in this Act expressed to be an offence,—if any person shall have any such matter in his personal custody or possession, or shall knowingly and wilfully have any such matter in any dwelling-house or other building, lodging, apartment, field, or other place, open or inclosed, whether belonging to or occupied by himself or not, and whether such matter shall be so had for his own use or benefit or for that of another, every such person shall be deemed and taken to have such matter in his custody or possession within the meaning of this Act." Where two persons, Rodgers and Large, were apprehended together, Large being the agent of Rodgers for the passing of base coin, and on Large were found sixteen counterfeit shillings, and on Rodgers only two—the judges held that Rodgers might be convicted as well as Large, for the statute did not require individual possession of any counterfeit coin, but it is quite enough if the coin be in the possession of the person or his immediate agent. *R. v. Rodgers and Large, Car. & M. 200 n.*

So, where two were indicted for this offence, and it appeared clearly in evidence that they were together and acting in concert in passing bad money; on the evening in question, one of them had passed two counterfeit sixpences, and on the other were found five more: on the authority of the last case, they were both convicted, and sentenced to nine months' imprisonment. *R. v. Charles and William Williams, Car. & M. 250.*

SECTION II.

*Offences relating to the Post-office.*1. *Persons employed by the Post-office, Stealing or Embezzling Letters.**Indictment.*

—— } The jurors for our Lady the Queen, upon their
to wit. } oath present, that A. B., on the —— day of ——,
in the year of our Lord ——, being then a person employed
under Her Majesty's post-office, and whilst he was so employed, feloniously did embezzle, secrete, and destroy [*"steal, or shall for any purpose whatever embezzle, secrete, or destroy"*] a certain post-letter of C. D., or of Her Majesty's postmaster-general, [which said post-letter then contained certain money (*"chattel, money, or valuable security;"* bank-notes and the notes of bankers may be described as money; 14 & 15 Vict. c. 100, s. 18, ante, p. 90) of C. D., or of Her Majesty's said postmaster-general]: against the form of the statute in such case made and provided, and against the peace of our Lady the Queen, her crown and dignity. [*As to the venue, see ante, p. 73. By stat. 1 Vict. c. 36, s. 40, it shall be lawful to lay the letter or money, &c., in the postmaster-general; it shall not be necessary to allege or prove it to be of any value; and it shall be sufficient to allege that the offender was employed under the post-office, without further stating the nature or particulars of the employment.*

Felony; transportation for seven years;—or imprisonment [with or without hard labour, and solitary for any portion of the time, s. 42] for not more than three years, Id. s. 26.

And if the post-letter shall contain any chattel, money, or valuable security, every such offender shall be transported for life; Id. s. 26; or for not less than seven years;—or imprisoned [with or without hard labour, and solitary for any portion of the time, s. 42] for not more than four years. Id. s. 26.

Accessories before the fact, the same punishment; accessories after the fact (not being receivers) imprisonment, &c., for not more than two years. Id. s. 35.

Evidence.

To maintain this indictment, the prosecutor must prove—

1. That the defendant, at the time the offence was committed, was employed by the post-office. It is not necessary to prove his appointment; proof that he exercised an office under the post-office, will be quite sufficient. *See ante*, p. 195; and see *R. v. Borrett*, 6 Car. & P. 124. *R. v. Rees*, *Id.* 606. Nor is it necessary that he should have taken the oath required by stat. 9 Ann. c. 10, s. 41; *Clay's case*, 2 East, P. C. 580; or if it be proved that he took the oath, he cannot deny his being employed by the post-office. *R. v. Milner*, 14 Shaw's J. P. 449. *R. v. Simpson*, *Id.* The postmaster in a country town is of course a person so employed. And where a postmistress employed a person at weekly wages, to carry the letter-bag from A. to B., but he never helped to sort the letters, &c., and she was allowed the wages in account with the post-office,—such person was holden to be in the employ of the post-office. *R. v. Salisbury*, 5 Car. & P. 155. But where a person employed by the post-office to keep a receiving house for letters, used to be assisted in sealing and tying the letter-bag by a person whom he employed to clean boots, &c., such assistant was holden not to be in the employ of the post-office. *R. v. Pearson*, 4 Car. & P. 572.

2. The embezzlement, secreting, or destroying of the letter, &c., as stated in the indictment. Where the prosecutor gave a letter, unsealed, to the postmistress at A., addressed to a person at Liverpool, with one pound, for a post-office order for that amount, threepence for poundage on the order, one penny for postage, and one penny for the messenger who was to get the order at B.; the postmistress, in due course of post, delivered these to the prisoner, who was in the employ of the post-office as post-messenger from A. to B., instructing him to get the order at B., to inclose it in the letter, and to post it there; the prisoner however embezzled the money and destroyed the letter, a part of the letter being afterwards found in a box in his possession: Cresswell, J., held this to be a post-letter within the meaning of this statute, and the defendant was convicted. *R. v. Bickerstaff*, 2 Car. & K. 781. Where a sorter of letters at the post-office made a mistake as to two letters in sorting the parcel in which they were, and in order to avoid the penalty attached to such a mistake, he

took these two letters to the water-closet and put them in, but before they escaped from the pan, he was apprehended, and the letters were found in the pan still sealed and unopened : being indicted on this statute for stealing the letters, with a count for secreting them, the jury found the facts as above mentioned ; and the case being reserved for the opinion of the judges of the criminal appeal court, they held that the defendant was clearly guilty of secreting the letters, and they thought that the facts found amounted to larceny also. *R. v. Wynn*, 2 *Car. & K.* 859. Where the prisoner, a letter carrier employed by the post-office, was indicted for stealing a post-letter containing a sovereign, with a count for stealing a sovereign, it appeared that the prisoner being suspected, a letter containing a marked sovereign, directed to a person in Great Windmill-street (which was in his district of delivery), was placed by one of the inspectors amongst some letters the prisoner was about to sort, and which he had to deliver that day ; the letter not being delivered, the prisoner was taken into custody, searched, and the marked sovereign found in his pocket : it was objected for him, that as the letter was not put into the post in the ordinary way, it was not a post-letter within the meaning of the Act, and of this opinion were the judges ; but they held that he was guilty of stealing the sovereign, and he had judgment accordingly. *R. v. Rathbone*, *Car. & M.* 220. By stat. 1 Vict. c. 36, in the interpretation clause, s. 47, the word " post-letter " is interpreted to mean " any letter or packet transmitted by the post, under the authority of the postmaster-general, and a letter shall be deemed a post-letter from the time of its being delivered to a post-office to the time of its being delivered to the person to whom it is addressed ; and a delivery to a letter-carrier or other person authorized to receive letters for the post, shall be a delivery to the post-office ; and a delivery at the house or office of the person to whom the letter is addressed, or to him or to his servant or agent or other person considered to be authorized to receive the letter, according to the usual manner of delivering that person's letters, shall be a delivery to the person addressed." Where a letter directed to a fictitious person and place, containing two half-sovereigns, was put into a post-office, to test the honesty of the postmistress there, and she abstracted it, and took out the half-sovereigns : Pollock, C. B., held that this was not a post-letter within the Act, being altogether fictitious, and not directed to any person who ever existed ; but he held that the prisoner was guilty of stealing the half sovereigns, and there being a count for larceny in the indictment, she was convicted. *R. v. Ann Gardner*, 1 *Car. & K.* 628. But in a case subsequently reserved for the opinion of the judges the contrary was holden, and Pollock, C. B., admitted that he was mistaken in his decision in *Gardner's* case.

The case was thus: some doubt being entertained of the honesty of the prisoner, who kept a receiving house for letters in Aldgate, a letter containing a half-sovereign, directed to a fictitious person, was dropped into the box at his receiving house, and the prisoner opened it, took out the half-sovereign, and kept both the letter and money: being indicted on this Act, for stealing a post-letter, and convicted, and the case being reserved for the opinion of the judges, they were unanimously of opinion that this was a post-letter within the Act, and that the defendant was properly convicted. *R. v. John C. Young*, 2 C. & K. 466. See *R. v. Harley*, post, p. 583.

The reader will perceive, by a reference to the punishments for this offence, (*ante*, p. 578), that where the letter stolen or embezzled contains money, chattel, or valuable security, the offence is punishable with greater severity. Where a woman being sent with a letter to a receiving-house with a penny to pay the postage, finding the shop of the receiving-house shut, put the penny into the letter, fastened it with a pin, and dropped it into the letter box; the prisoner being a messenger in the post-office, and engaged in stamping and preparing the letters from the receiving-houses, abstracted this letter from the rest, and a constable being sent for, after a hard struggle it was taken from him: being indicted for stealing a letter containing money, Lord Denman, C. J., held it to be such within the meaning of the Act, and he was convicted. *R. v. Mence*, Car. & M. 234. As to a security for payment of money, see *ante*, p. 391.

As to embezzlement of money by persons employed in the post-office, see *ante*, p. 462; and see *R. v. Glass*, 2 Car. & K. 395.

2. Stealing a Post-letter or Post-letter Bag from a Post-office, &c.

Indictment.

— } The jurors for our Lady the Queen, upon their
to wit. } oath present, that A. B., on the — day of —,
in the year of our Lord —, did feloniously steal, take, and
carry away a certain post-letter of C. D., [or of Her Majesty's
postmaster-general] from a certain post-office situate in the
parish of —, in the county of —, [“steal a post-letter
bag — or a post-letter from a post letter-bag — or steal a
post-letter from a post-office, or from an officer of the
post-office,—or from a mail,—or stop a mail with intent
to rob or search the same]: against the form of the statute
in such case made and provided, and against the peace of our
Lady the Queen, her crown and dignity. [As to the venue,
see *ante*, p. 73.]

Felony; transportation for life, 1 Vict. c. 36, s. 28, or for not less than seven years; Id. s. 41;—or imprisonment, [with or without hard labour, and solitary for any portion of the time, s. 42] for not more than four years. Id. s. 41.

Accessories before the fact, the same punishment; accessories after the fact (not being receivers), imprisonment, &c., for not more than two years. Id. s. 35.

Evidence.

To maintain this indictment, the prosecutor must prove the stealing of the letter, &c., as stated in the indictment. It is not necessary that the offender should be in the employ of the post-office. Where the prisoner, a female-servant out of place, applied to a lady at Cheltenham for a situation, and referred for her character to a lady at Ross, whose service she had left; the lady at Cheltenham accordingly wrote to the lady at Ross for the character, but the prisoner went to the post-office at Ross, and representing herself to be the lady's servant, obtained the letter and burnt it: being indicted for stealing the letter under this Act, it was objected that as it was not *domus lucri causâ*, it was not an offence within the Act; but the prisoner being convicted, and the point being reserved for the opinion of the judges at the criminal appeal court, they held this to be a larceny of the letter, and that the prisoner was properly convicted. *R. v. Elizabeth Jones*, 2 Car. & K. 236.

As to the interpretation of the word "post-letter," see in the last case, *ante*, p. 580; and as to the meaning of "post-letter bag," see 1 Vict. c. 36, s. 41. See *R. v. Harley*, *post*, p. 583.

3. Stealing Money, &c., out of a Post-letter.

Indictment.

—) The jurors for our Lady the Queen, upon their
to wit.) oath present, that A. B., on the — day of —,
in the year of our Lord —, feloniously did steal, take, and
carry away out of a certain post-letter of C. D., [or of Her
Majesty's postmaster-general], certain money ["*any chat-
tel, money, or valuable security,*"] of the said C. D., or of
Her Majesty's postmaster-general: against the form of the
statute in such case made and provided, and against the peace
of our Lady the Queen, her crown and dignity. [*As to the
venue, see ante*, p. 73.

Felony; transportation for life, 1 Viet. c. 36, s. 27, or for not less than seven years; Id. s. 41;—or imprisonment, [with or without hard labour, and solitary for any portion of the time, s. 42], for not more than four years. Id. s. 41.

Accessories before the fact, the same punishment; accessories after the fact, (not being receivers), imprisonment, &c., for not more than two years. Id. s. 35.

Evidence.

To maintain this indictment, the prosecutor must prove—

1. The stealing of money or bank-notes. Or if the stealing be of a chattel or valuable security, it must be stated and proved as in ordinary cases of larceny of the same.

2. That the stealing was from a post-letter. As to the meaning of "post-letter," *see ante*, p. 580. Where the post-office was at an inn in a country town, and the prosecutor sent his apprentice with a letter, containing bank-notes, to put into the post-office; he went accordingly to the inn, and there being no person then in the bar to receive the letter, he laid it on a table under the bar window in a passage leading to the kitchen, together with twopence to pay the postage, and the prisoner, a female servant of the innkeeper, but having no authority to receive post-letters, being present, said to him, "they will be here directly, and I will give it to them," and he then went away; the prisoner, however, stole the letter and its contents: being indicted for this, as for stealing from a post-letter, with a count for larceny of the notes, Wightman, J., held that it was not a post-letter, as it had not been posted, but the prisoner was found guilty of the larceny on the latter count. *R. v. Hannak Harley*, 1 Car. & K. 89.

SECTION III.

Smuggling.

Armed Assemblies, to Assist in Smuggling.

Indictment.

— } The jurors for our Lady the Queen, upon their
to wit } oath present, that A. B., E. F., and G. H., to-
gether with divers other persons to the number of three and

more, on the — day of —, in the year of our Lord —, within the United Kingdom of Great Britain and Ireland [*“within the United Kingdom, or within the limits of any port, harbour, or creek thereof,”*] being then armed with fire-arms and other offensive weapons, to wit, with divers [guns, pistols, swords, and bludgeons,] were then feloniously assembled together, in order then to be aiding and assisting in the illegal landing, running, and carrying away of divers goods liable to certain duties which had not then been either paid or secured [*“in the illegal landing, running, or carrying away of any prohibited goods, or any goods liable to any duties which have not been paid or secured;—or in rescuing or taking away such goods as aforesaid, after seizure, from the officer of the customs or other officer authorized to seize the same, or from any person or persons employed by them or assisting them, or from the place where the same shall have been lodged by them;—or in rescuing any person who shall have been apprehended for any of the offences made felony by this or any Act relating to the customs;—or in preventing the apprehension of any person who shall have been guilty of such offence”*]: against the form of the statute in such case made and provided, and against the peace of our Lady the Queen, her crown and dignity. [*As to the venue, see ante, p. 72. Indictment not to be preferred, unless by direction of the commissioners of the customs; 8 & 9 Vict. c. 87, s. 126; and must be preferred within three years from the commission of the offence. Id. s. 134.*

Felony; transportation for life, or not less than fifteen years; or imprisonment for not more than three years. 8 & 9 Vict. c. 87, s. 68.

Evidence.

To maintain this indictment, the prosecutor must prove—

1. That the prisoners, or the prisoners and others, to the number of three or more, were assembled, and armed, as stated in the indictment. What is an offensive weapon, within the meaning of the Act, may be learned, from the interpretation given to the same words in the night poaching Act, 9 G. 4, c. 60, s. 9, *ante*, p. 408. The words of that Act, however, are, “any of such persons being armed with any gun, cross-bow, fire-arms, bludgeon, or any other offensive weapon;” so that if any one of the party be armed, it would be sufficient within the meaning of that statute. But here it is different: the statute seems to require that three at least should be armed, and they would be guilty as principals in the first degree; it is probable, however, that others, though unarmed,

who are assembled with them for the same purpose, and ready and intending to aid and assist them in the landing or running of the goods, would be deemed principals in the second degree.

2. That they were thus assembled and armed for the purpose stated in the indictment. This is proved, by proving circumstances from which the jury may fairly presume it.

2. *Being found with Uncustomed Goods, armed, and in company with another.*

Indictment.

— } The jurors for our Lady the Queen, upon their
to wit. } oath present, that A. B., on the — day of —,
in the year of our Lord —, being then in company with
one other person to the jurors aforesaid unknown, within five
miles, to wit, three miles of the sea coast [*“ of the sea coast,
or of any navigable river leading therefrom ”*] was there
found with certain goods liable to forfeiture by and under the
laws relating to the revenue of the customs, and then carrying
offensive arms and weapons, to wit, — [or being then dis-
guised, to wit, having their faces blackened,—or *as the case
may be*] : against the form of the statute in such case made
and provided, and against the peace of our Lady the Queen,
her crown and dignity. [*As to the venue, see ante, p. 72.*
*Indictment not to be preferred, unless by direction of the
commissioners of the customs ; 8 & 9 Vict. c. 87, s. 126 ; and
must be preferred within three years from the commission of
the offence. Id. s. 134.*

Felony ; transportation for seven years. Id. s. 65.

Evidence.

To maintain this indictment, the prosecutor must prove that the prisoner was found within five miles of the sea coast, or of a navigable river, armed or disguised, as stated in the indictment, with goods liable to forfeiture, by the laws relating to the revenue of the customs, that is to say, either goods the importation of which is actually prohibited, or goods liable to a duty on importation, but which duty has not been paid or secured. It must be proved also that another person was then in his company. It is perhaps doubtful whether this clause of the statute means that both the parties should be armed. But according to the strict construction of it, one of the two being armed would be sufficient to bring the

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case within the meaning of it; he would be principal in the first degree, and the other, if knowingly aiding and assisting him, would be principal in the second.

3. *Shooting at or Wounding Officers of the Customs, &c.*

Indictment.

— The jurors for our Lady the Queen, upon their oath present, that A. B., on the — day of —, in the year of our Lord —, a certain [pistol] then loaded with gunpowder and [one leaden bullet,] which pistol he the said A. B. in his right hand then had and held, did then maliciously and feloniously shoot and discharge at and against one C. D. [*“shoot at, maim, or dangerously wound,”*] the said C. D. being then an officer of the customs, and in the due execution of his office and duty as such officer then being: [*“any officer of the army, navy, or marines, being duly employed in the prevention of smuggling, and on full pay,—or any officer of customs or excise, or any person acting in his aid or assistance, or duly employed for the prevention of smuggling”*:] against the form of the statute in such case made and provided, and against the peace of our Lady the Queen, her crown and dignity. [*You may add a count for shooting, maiming, or wounding, see ante, p. 270, 262. As to the venue, see ante, p. 72. Indictment not to be preferred, unless by direction of the commissioners of the customs; 8 & 9 Vict. c. 87, s. 126; and must be preferred within three years from the commission of the offence. Id. s. 134.*

Felony; transportation for life, or not less than fifteen years;—or imprisonment for not more than three years. Id. s. 64.

Evidence.

To maintain this indictment, the prosecutor must prove—

1. That the defendant shot at C. D., or maimed or dangerously wounded him, as stated in the indictment. As to evidence of the shooting, see ante, p. 274; as to maiming, see ante, p. 264; and as to wounding, see ante, p. 260.

2. That C. D. was at the time an officer of the customs, and in the exercise of his duty as such. By stat. 8 & 9 Vict. c. 87, s. 132, if upon any trial a question shall arise whether any person is an officer of the army, navy, or marines, being duly employed for the prevention of smuggling, and on full pay,—or an officer of customs or excise,—evidence of his having

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acted as such shall be deemed sufficient; and such person shall not be required to produce his commission or deputation, unless sufficient proof shall be given to the contrary. And by sect. 131, all persons employed for the prevention of smuggling, under the direction of the commissioners of Her Majesty's customs, or of any officer in the service of the customs, shall be deemed and taken to be duly employed for the prevention of smuggling.

4. Assaulting or Obstructing Officers of the Customs, &c., in the exercise of their duty.

Indictment.

— } The jurors for our Lady the Queen, upon their
to wit. } oath present, that A. B., on the — day of —,
in the year of our Lord —, did by force and violence assault; resist, oppose, hinder, and obstruct one C. D., the said C. D. being then an officer of the customs, and in the due execution of his office and duty as such officer then being: [*“any officer of the army, navy, or marines, being duly employed for the prevention of smuggling, and on full pay,—or any officer of customs or excise, or other person acting in his or their aid or assistance, or duly employed for the prevention of smuggling, in the due execution of his or their office or duty”*]: against the form of the statute in such case made and provided, and against the peace of our Lady the Queen, her crown and dignity. [*You may add a count for a common assault, as ante, p. 282. As to the venue, see ante, p. 72. Indictment not to be preferred, unless by direction of the commissioners of customs; 8 & 9 Vict. c. 87, s. 126; and must be preferred within three years from the commission of the offence. Id. s. 134.*

Misdemeanor; transportation for seven years;—or imprisonment with hard labour for not more than three years. Id. s. 66.

Evidence.

To maintain this indictment, the prosecutor must prove—

1. That the defendant, by force and violence, assaulted or obstructed C. D., as stated in the indictment.

2. That C. D. was at the time an officer of the customs, and in the execution of his duty as such; or that he was an officer in the army, navy, or marines, on full pay, and employed in the prevention of smuggling;—as in the last case.

SECTION IV.

Riot.

Indictment.

— } The jurors for our Lady the Queen, upon their
to wit { oath present, that A. B., E. F., G. H., and I. K.,
together with divers other evil-disposed persons to the jurors
aforesaid unknown, on the — day of —, in the year of
our Lord —, with force and arms, to wit, with sticks, staves,
and other offensive weapons, unlawfully, riotously, routously,
and tumultuously did assemble and gather together, to disturb
the peace of our Lady the Queen; and did then unlawfully,
riotously, routously, and tumultuously make a great noise,
riot, tumult, and disturbance, to the great terror and disturb-
ance, not only of the liege subjects of our Lady the Queen
there being and residing, but of all other of the Queen's liege
subjects then passing in and along the Queen's common high-
way there; and being so assembled and gathered together as
aforesaid, they the said A. B., E. F., G. H., I. K., and the
said other evil-disposed persons aforesaid did then unlawfully,
riotously, routously, and tumultuously {make an assault
upon C. D., and him the said C. D. did then unlawfully,
riotously, routously, and tumultuously beat, wound, and ill-
treat, and other wrongs to the said C. D. unlawfully, riotously,
routously, and tumultuously then did, *stating the act done,
as the case may be*}: against the peace of our Lady the Queen,
her crown and dignity. *[If the act so riotously effected, be
prohibited or punishable by statute, it may be prudent to
conclude contra formam statuti. Add a count for the act
done, if it be an indictable offence.*

*Misdemeanor; imprisonment, {and (if the court think fit)
hard labour; 3 G. 4, c. 114, ante, p. 183;} or fine, or both.
Cocke, ante, p. 187.*

Evidence.

A riot is a tumultuous disturbance of the peace, by three
persons or more assembling together of their own authority,
with an intent mutually to assist one another against any one
who shall oppose them, in the execution of some enterprise of
a private nature, and afterwards actually executing the same
in a violent and turbulent manner, to the terror of the people,
whether the act itself were lawful or unlawful. 1 Hawk.
c. 65, s. 1.

To maintain this indictment, therefore, the prosecutor must prove—

1. The assembly :—that the defendants, or the defendants and others, to the number of three at the least, assembled together of their own authority. It is immaterial, however, whether a defendant was one of the party first assembled, or whether he joined that party afterwards during the progress of the riot, and took part in it; in either case he is equally guilty. 1 *Hawk. c. 65, s. 3.*

2. That they so assembled together, with intent to execute some enterprise of a private nature, and also mutually to assist one another against any person who should oppose them in doing so. The intent is proved in this, as in every other case, by proving facts from which the jury may fairly presume it. *See ante*, pp. 110; 120. The actual execution of the enterprise charged in the indictment, is abundant proof of their previous intention to execute it. So, their intention mutually to assist each other, may be inferred either from their afterwards actually assisting each other, or from their exclamations or actions, &c., whilst so assembled. *See R. v. Hunt, 3 B. & A. 566.* And the injury or grievance complained of, and intended to be revenged or remedied by such an assembly, must relate to some private matter or quarrel only, such as the inclosing of lands in which the inhabitants of a particular town have a right of common, or gaining the possession of lands, the title to which is in dispute, or the like; for wherever the intention of such an assembly is to redress public grievances, as to pull down all inclosures generally, to reform religion, to remove evil counsellors from the Queen, &c., if they execute such their intentions with force, this would be a levying of war against the Queen, and treason. 1 *Hawk. c. 65, s. 6.* Also, as to the act to be done, it is immaterial whether it be lawful or unlawful: as for instance, it is lawful to abate a nuisance, if done peaceably; but if three or more join in doing it in a violent and tumultuous manner, it is a riot; for the law will not suffer persons to seek redress of their private grievances by such dangerous disturbances of the public peace. 1 *Hawk. c. 65, s. 7.*

It seems agreed, however, that if a number of persons, having met together at a fair or market, or on any other lawful or innocent occasion, happen on a sudden quarrel to fall out, they are not guilty of a riot, but of a sudden affray only, of which none are guilty but those who actually engage in it; because the design of their meeting was innocent and lawful, and the subsequent breach of the peace happened unexpectedly without any previous intention concerning it. 1 *Hawk. c. 65, s. 3.* Yet it is said, that if persons innocently assembled

together, do afterwards, upon a dispute happening to arise among them, form themselves into parties, with promises of mutual assistance, and then make an affray, they are guilty of a riot, because upon their confederating together with an intention to break the peace, they may as properly be said to be assembled together for that purpose from the time of such confederacy, as if their first coming together had been on such a design. *Id.* However, it seems clear, that if, in an assembly of persons met together on any lawful occasion, a sudden proposal should be stated of going together in a body to pull down a house or inclosure, or to do any other act of violence, to the disturbance of the public peace, and such motion be agreed to, and executed accordingly, the persons concerned cannot but be rioters, because their associating themselves together for such a new purpose, is in no way extenuated by their having met at first upon another. 1 *Hawk. c. 65, s. 3.*

3. That they actually executed the enterprise intended. If not executed, the assembly would not in law amount to a riot, but to an unlawful assembly or rout only:—an unlawful assembly, where the enterprise is merely contemplated, but nothing further done for the purpose of carrying it into execution;—a rout where the enterprise is not only contemplated, but the parties take some steps for the purpose of carrying it into execution; 1 *Hawk, c. 65, ss. 8, 9*; it is a riot only where what was contemplated is actually carried into execution. And the execution of such enterprise must be attended with such circumstances, either of actual force or violence, or at least of an apparent tendency thereto, as are naturally calculated to strike terror into the people: as the show of armour, threatening speeches or turbulent gestures; for every such offence must be laid to be done in *terrorem populi*; 1 *Hawk. c. 65, s. 5, and see s. 4*; otherwise the defendants cannot be convicted of a riot, *R. v. Hughes, 4 Car. & P. 373*, although they may of an unlawful assembly, *R. v. Cox et al., Id. 538*. And it seems that where three persons or more use force and violence in the execution of any design whatever, wherein the law does not allow the use of such force, all who are concerned therein are rioters. 1 *Hawk. c. 65, s. 2*. On the other hand, three or more persons may assemble, for the purpose of executing a wrongful act, and actually execute it, without being rioters, if they do it without threats or circumstances of terror. *Id. s. 5.*

If you fail in proving the assault, or other act intended, the defendants, it seems, may still be convicted of an unlawful assembly. *R. v. Birt et al., 5 Car. & P. 154. R. v. Cox et al., 4 Car. & P. 373.*

If two only be convicted, no judgment can legally be given unless the indictment charge them with having committed the

offence together with other persons to the jury unknown; for unless three persons were concerned in it, it could not be a riot. 2 Hawk. c. 47, s. 8. But where six were indicted, and two died before trial, two were acquitted, and the remaining two found guilty, it was holden sufficient; for as the jury found them guilty, it must be presumed that they committed the offence with one or both of the defendants who died, for otherwise they could not have been found guilty of a riot. *R. v. Scott and Hane*, 3 Burr. 1262.

As to the apprehension of the offenders, in case of riot, see *ante*, p. 23; and the like after the Riot Act, or rather the proclamation, read, *ante*, p. 25. Opposing the reading of the proclamation is felony, 1 G. 1, st. 2, c. 5, s. 5, and punishable with transportation for life or not less than fifteen years, or imprisonment [with or without hard labour, and solitary for not more than a month at a time, or three months in a year], for not more than three years. 1 Vict. c. 91, ss. 1, 2. And twelve or more of the rioters, riotously and tumultuously remaining together for one hour after proclamation, is also a felony, 1 G. 1, st. 2, c. 5, ss. 1, 5, and punishable in like manner. 1 Vict. c. 91, ss. 1, 2.

SECTION V.

Perjury.

In what cases Prosecution ordered.

By stat. 14 & 15 Vict. c. 100, s. 19, "it shall and may be lawful for the judges or judge of any of the superior courts of common law or equity,—or for any of Her Majesty's justices or commissioners of assize, nisi prius, oyer and terminer, or gaol delivery,—or for any justices of the peace, recorder or deputy-recorder, chairman, or other judge, holding any general or quarter sessions of the peace,—or for any commissioner of bankruptcy or insolvency,—or for any judge or deputy-judge of any county court or any court of record,—or for any justices of the peace in special or petty sessions,—or for any sheriff or his lawful deputy before whom any writ of inquiry or writ of trial from any of the superior courts shall be executed,—in case it shall appear to him or them that any person has been guilty of wilful and corrupt perjury in any evidence given, or in any affidavit, deposition, examination, answer, or other

proceeding made or taken before him or them, to direct such person to be prosecuted for such perjury, in case there shall appear to him or them a reasonable cause for such prosecution,—and to commit such person so directed to be prosecuted until the next session of oyer and terminer or gaol delivery for the county or other district within which such perjury was committed, unless such person shall enter into a recognizance, with one or more sufficient surety or sureties, conditioned for the appearance of such person at such next session of oyer and terminer or gaol delivery, and that he will then surrender and take his trial, and not depart the court without leave,—and to require any person he or they may think fit to enter into a recognizance, conditioned to prosecute or give evidence against such person so directed to be prosecuted as aforesaid,—and to give to the party so bound to prosecute a certificate of the same being directed, which certificate shall be given without any fee or charge, and shall be deemed sufficient proof of such prosecution having been directed as aforesaid;—and upon the production thereof the costs of such prosecution shall and are hereby required to be allowed by the court before which any person shall be prosecuted or tried in pursuance of such direction as aforesaid, unless such last-mentioned court shall specially otherwise direct: provided always, that no such direction or certificate shall be given in evidence upon any trial to be had against any person upon a prosecution so directed as aforesaid."

Indictment.

By stat. 14 & 15 Vict. c 100, s. 20, "in every indictment for perjury,—or for unlawfully, wilfully, falsely, fraudulently, deceitfully, maliciously, or corruptly taking, making, signing, or subscribing any oath, affirmation, declaration, affidavit, deposition, bill, answer, notice, certificate, or other writing,—it shall be sufficient to set forth the substance of the offence charged upon the defendant, and by what court or before whom the oath, affirmation, declaration, affidavit, deposition, bill, answer, notice, certificate, or other writing, was taken, made, signed, or subscribed,—without setting forth the bill, answer, information, indictment, declaration, or any part of any proceeding either in law or in equity,—and without setting forth the commission or authority of the court or person before whom such offence was committed."

And the substance of the offence is, that in a judicial proceeding,—before a court having jurisdiction,—and before a person having authority to administer an oath,—the party wilfully made oath,—to a statement of a material fact,—which statement was false. *See 3 Inst. 164.* In this order I shall

examine the different parts of the indictment, and what must necessarily be stated.

In a judicial proceeding.] It must appear upon the face of the indictment, that the oath was taken, and the matter sworn, in some judicial proceeding, otherwise it is not perjury, 3 *Inst.* 166. 1 *Hawk. c.* 69, s. 3, unless made so by some particular statute. But if taken in any of the courts of law at Westminster, in giving evidence as a witness, or in an affidavit in any proceeding therein; or if taken in giving evidence on the execution of a writ of inquiry, see *Pippet v. Hearn*, 5 *B. & A.* 634, or on a writ of trial; *R. v. Dunn*, 1 *Car. & K.* 730; or if taken in courts of law, or before an arbitrator, by either of the parties, if examined; see 14 & 15 *Vict. c.* 99, s. 2; or if taken in a court of equity, in swearing to an answer, see *R. v. Yates*, *Car. & M.* 132, or affidavit; see *R. v. Christman*, *Car. & M.* 388; or if taken in a cause in the ecclesiastical courts; or in giving evidence before a grand jury, *R. v. Mary Hughes*, 1 *Car. & K.* 519, or before a petty jury, on the trial of an indictment, in all cases where the court has jurisdiction; or in giving evidence upon a trial in a county court; see *R. v. Fellooses*, 1 *Car. & K.* 115; or in an examination before commissioners of bankruptcy; *R. v. Ewington*, *Car. & M.* 319; or before justices of the peace, whether in special sessions, petty sessions, or separately, in cases in which they have jurisdiction: *R. v. Rawlins*, 8 *Car. & P.* 439. *R. v. Goodfellow et al.*, *Car. & M.* 569: in all these cases if the party, swearing, wilfully make a false statement upon his oath, he is guilty of perjury. Formerly a false affidavit made before a surrogate, to obtain a marriage licence, was not the subject of an indictment for perjury, for it was not made in a judicial proceeding; *R. v. Foster*, *R. & Ry.* 450; and see *R. v. Chapman*, 2 *Car. & K.* 346; but now such a false affidavit is made perjury by the late Marriage Acts, 3 *Geo. 4, c.* 75, s. 10, and 6 & 7 *Will. 4, c.* 85, s. 38. It is immaterial however whether the court be a court of record or not, provided it have jurisdiction, and the oath be taken in the course of a judicial proceeding. 1 *Hawk. c.* 69, s. 3. And the indictment must show that such judicial proceeding was pending in the court, at the time the oath was taken and the false statement made. Therefore where the indictment stated that the defendant went before two justices of the peace, and being sworn, &c., stated and deposed, &c., without alleging that any information had previously been laid, it was holden bad. *R. v. Pearson*, 8 *Car. & P.* 439. Where a party claiming goods seized under an execution, made an affidavit stating that he had purchased and paid for them, and was indicted for perjury, but as the indictment did not state that any application had been made

for an interpleader rule; it was helden bad, for it did not appear that any proceeding was pending to which the affidavit was applicable. *R. v. Bishop*, *Car. & M.* 302. So in other cases, where the false oath is made in the course of a suit, the indictment must show that a suit was then depending; if it be preliminary to a suit, and in a matter of which the court has jurisdiction, the indictment must show it.

Before a court having jurisdiction.] The general rule as to jurisdiction is, that nothing shall be intended to be out of the jurisdiction of a superior court, but that which specially appears to be so; and on the contrary, nothing shall be intended to be within the jurisdiction of an inferior court, but that which is so expressly alleged. 1 *Saund.* 74. *Bac. Abr. Pleas*, R. 1. But where an inferior court derives its jurisdiction from a public statute, as for instance the new county courts, it is sufficient to describe the proceeding so as to bring it within the statute; for the court which tries the perjury, must take judicial notice of the jurisdiction. On the other hand, if the perjury be committed at the trial of a cause, even in the superior courts, after the action had abated by death or the like, as the trial in that case would be *commun non judica*, no indictment would lie for the perjury. See *R. v. Cohen*, 1 *Stark. Rep.* 511. But by stat. 14 & 15 Vict. c. 100, s. 20, (*ante*, p. 592,) it shall not be necessary, in the indictment, to set out "the bill, answer, information, indictment, declaration, or any part of any proceeding in law or in equity," and also it shall not be necessary to set forth "the commission or authority of the court or person before whom the perjury was committed."

Before a person authorized to administer an oath.] The oath must be taken before a person having competent authority to administer it, otherwise the false statement would be no offence. 1 *Hack. c.* 69, s. 4. A former statute, (29 G. 2, s. 11, s. 1,) for simplifying the indictment for perjury, enacted that it should be sufficient to set forth the substance of the offence charged upon the defendant, and by what court or before whom the oath was taken, ("averring such court, or person or persons to have a competent authority to administer the same,") &c.; and the practice therefore was, after stating that the party was sworn before J. S., to aver—"the said J. S., then having sufficient and competent authority to administer the said oath to the said A. B. in that behalf." The present statute upon the subject, 14 & 15 Vict. c. 100, s. 20, (*ante*, p. 592,) is the same, but omits the above words between the parentheses; so that there does not seem to be any longer a necessity for the averment that the judge or officer had authority to administer the oath. Besides, by stat. 14 & 15 Vict. c. 99, s. 16, it is now generally enacted that "every

court, judge, justice, officer, commissioner, arbitrator, or other person, now or hereafter having by law, or by consent of parties, authority to hear, receive, and examine evidence, is hereby empowered to administer an oath to all such witnesses as are legally called before them respectively." So that the authority of the court, &c., appearing in the preceding part of the indictment, it is unnecessary to aver that the judge or person presiding had authority to administer the oath, for the judge or court before whom the trial for the perjury is had, must take judicial notice of it. Also, by stat. 14 & 15 Vict. c. 100, s. 20, it is not necessary to set forth "the commission or authority of the court or person" before whom the perjury was committed; and even before that statute, upon an indictment for perjury, in an oath taken before a surrogate in the ecclesiastical court, it was holden that the fact of the person, who administered the oath, having acted as surrogate, was sufficient evidence of his being so, without producing his appointment. *R. v. Verelst*, 3 Camp. 482. So, upon an indictment for perjury in an affidavit sworn before a commissioner, proof that he acted as a commissioner, was holden to be *prima facie* evidence that he was one. *R. v. Newton*, 1 Car. & K. 460.

That the oath was administered.] In ordinary cases; the party is sworn upon the New Testament, or rather, upon the Gospels of the four Evangelists, usually called in the indictment "the holy Gospel of God." Jews are sworn upon the Old Testament, or rather, upon the five books of Moses. Quakers and Moravians, instead of taking an oath, make an affirmation; 3 & 4 W. 4, c. 49; so do those who, being formerly Quakers or Moravians, have seceded from them; 1 & 2 Vict. c. 77; so do persons of the sect called Separatists; 3 & 4 W. 4, c. 82; in all which cases, a false affirmation is punishable as perjury. And lastly, by stat. 1 & 2 Vict. c. 105, "in all cases in which an oath may lawfully be or shall have been administered to any person, either as a jurymen or a witness, or a deponent in any proceeding civil or criminal, in any court of law or equity in the United Kingdom, or on appointment to any office or employment, or on any occasion whatever, such person is bound by the oath administered, provided the same shall have been administered in form and with such ceremonies as such person may declare to be binding; and every such person, in case of wilful false swearing, may be convicted of the crime of perjury, in the same manner as if the oath had been administered in the form and with the ceremonies most commonly adopted."

That the statement was wilful.] The false statement must have been wilfully made; for if a man swear falsely from in-

advertence or mistake, it is no offence. 2 Hawk. c. 69, s. 2. But where an indictment charged the offence to have been committed, "falsely, maliciously, wickedly, and corruptly," it was holden that this was equivalent to its being stated to have been done wilfully, and was sufficient in an indictment for perjury at common law. *R. v. Cox*, 1 Leach, 71. Hawkins says (1 Hawk. c. 69, s. 7), "it is said that no oath shall amount to perjury, unless it be sworn absolutely and directly; and that therefore he who swears a thing according as he thinks, remembers, or believes, cannot in respect of such an oath be found guilty of perjury." But in Miller's case (3 Wils. 427, 2 W. Bl. 881), *Ld. C. J. De Grey* said, that it was a mistake mankind had fallen into, that a person cannot be convicted of perjury who swears that he thinks or believes a fact to be true, for that he certainly may, and it only renders the proof of it more difficult. And in the case of *R. v. Podley* (1 Leach, 325), this opinion was confirmed by *Ld. Mansfield, C. J.* The question was also agitated in the court of common pleas, in the year 1780, by Mr. Serjeant Walker, when *Ld. Loughborough* and the other judges were unanimous that belief was to be considered as an absolute term, and that an indictment might be supported upon it. *Notes to 1 Hawk. c. 69, s. 7.* Whether the statement be credited or not, or the party in whose prejudice it was intended were injured or aggrieved by it or not, is wholly immaterial. 1 Hawk. c. 69, s. 9.

That the statement be material.] The statement alleged to be false, must be material to the subject then under consideration, otherwise it does not amount to the offence of perjury. 1 Hawk. c. 69, s. 8. 3 Inst. 167. But if it tend even circumstantially to the proof of the issue, it will be deemed material. As where in an action for trespass by sheep, a witness proved that he saw thirty or forty sheep in the close, and he knew they were the defendant's, by their being marked in a particular way, describing it, whereas the defendant never marked his sheep in that way: this was holden to be material, for the reason assigned by him made his account more credible. 1 Hawk. c. 69, s. 8. And it may thus be material, although it be not of itself sufficient to maintain the issue. 2 *Ld. Raym.* 889. If it tend in any way to lessen or aggravate the damages, it is material. 1 Hawk. c. 69, s. 8. Where upon an appeal against a surcharge of tax for a greyhound, the appellant proved by one Overton, that he had sold the greyhound before 12th September, and he produced and the witness proved the receipt for it, which he said was given before the 12th September: being indicted for perjury, the indictment alleging that it became a material question whether the receipt was given before the 12th September, it was objected

that the time of giving the receipt was wholly immaterial, the only material question being the time of the sale, upon which no perjury was assigned; but Patteson, J., at the trial, and the judges afterwards, held that it was material, as it tended to confirm the witness's evidence as to the time of the sale. *R. v. Overton, Car. & M.* 655. So, all questions put to a witness in cross-examination, for the purpose of testing his credit, may be deemed material, whether they have a tendency to prove the issue or not. *Id.*; and 1 *Hawk. c. 69, s. 8*. But where a witness was asked whether A. brought a certain number of sheep from S. T. all together, and he answered that he did, whereas he brought part of them at one time and the rest at another, this was holden not to be perjury, because the substance of the question was whether he had brought them all or not, and not the manner of bringing them. 1 *Hawk. c. 69, s. 8*. So, where the question was, whether a certain person was of sound mind or not, and a witness introduced his evidence by giving an account of a journey he had taken to see the party, and he falsely stated some of the circumstances of the journey,—this was holden not to be perjury. *Id.* So, where a witness being asked whether a certain sum was paid for two things in controversy between the parties, and he said it was, whereas it was paid for one of them only, but it was immaterial in the case whether it was paid for one or both: it was holden not to be perjury. *Id.* So, where a witness swore that the defendant drew his dagger and beat and wounded J. S., whereas he beat and wounded him with a staff: this was holden not to be perjury. *Id.* So, in general, where the witness answers the substance of the question truly, he cannot be indicted for perjury if through inadvertence he err in his statement of a circumstance attending it, which is not material. *Id.* Still however if a question as to such a circumstance be put to him in cross-examination, to sift him as to his knowledge of the substantial part, and he swear falsely, it is deemed material and perjury. *Id.* But where an action or bill in equity is brought to enforce a contract void by the statute of frauds, and the defence of the statute is set up, a false statement made by a party or witness cannot be made the subject of an indictment for perjury; for the promise being void, it is immaterial which way the party swears. *R. v. Benesoch, Peake Add. Ca.* 93. *R. v. Dunston, Ry. & M., N. P. Ca.* 109. Where however A. brought an action against B. and his partners for the price of wheat, and recovered a verdict on the bought and sold notes; but the defendants filed a bill praying an injunction, and stating that the bought and sold notes did not contain the whole of the contract, for it had also been agreed that the wheat shou'd be paid for by an acceptance at three months; and A. in his answer denied the statement in the bill, and the bill was dismissed; A. being indicted for perjury in his

answer, it was objected that the only legitimate evidence of the contract being the bought and sold notes, evidence as to the parol part of the contract must be immaterial, and therefore not the subject of perjury: but Coleridge, J., held otherwise, and distinguished the case from the last two cases above cited, for there the proceedings were to enforce the contract, here to avoid it. *R. v. Yates, Car. & M.* 132. And where a witness upon the trial of an indictment, gave material evidence, and the party was convicted, but the judgment was afterwards reversed on writ of error; the witness being indicted for perjury in the evidence he gave on that occasion, it was objected that the evidence never could have been material, as the former indictment was holden bad upon error: but Williams, J., overruled the objection, as it could not depend on the validity of the form of the indictment, whether the evidence given in support of it were perjury or not. *R. v. Mack, 2 Car. & P.* 513.

And the false statement must either appear to be material upon the face of the indictment, or be averred to be so. It may sufficiently appear to be material from the nature of the evidence itself, or from certain facts stated by way of inducement in the commencement of the indictment. If the materiality be stated by way of averment, it may be thus:—after stating the proceeding pending, and the defendant being sworn, “and upon the [trial of the said issue] it then became and was a material question in the said suit, whether,” &c. Where in an indictment against a witness for perjury committed on a trial for murder, it was averred that “at and upon the said trial it then and there became and was a material question whether,” &c.: this was holden to be a sufficient averment that the question was material on that trial. *R. v. Deacon, 5 T. R.* 311. Where in an indictment against a witness for perjury committed on a trial upon an indictment for a rape, it was averred; “that upon the trial of the said indictment, the following questions became and were material, and each of them respectively became and was a material question, whether or not,” &c., “and whether or not,” &c., setting out different questions alleged to be material, then stating the witness's evidence, and negating it: this was holden sufficient. *R. v. Bennett, 20 Law J.* 217 m. But where upon an indictment for perjury in an answer to a bill in equity, the averment was that it then and there became a material question whether, &c., without saying, “upon the hearing,” &c., or “in the suit,” it was holden insufficient. *R. v. Cutts, 14 Shaw's J. P.* 655. So where the alleged perjury was in answer to interrogatories in equity, and the averment was, that upon the examination of the defendant upon the interrogatories, it became a material question to ascertain the truth of the matters alleged to have been sworn to.

by the defendant in answer to the ninth interrogatory: Coleridge, J., thought this bad, because it did not appear from it that the alleged perjury was material to the suit; but it became unnecessary to decide the point, as the defendant was acquitted on the merits. *R. v. Hewins*, 9 Car. & P. 786. So, where an indictment for perjury by a witness in evidence given by him before T. S., a magistrate, upon an information against one Liversuch, for trespassing in search of game, the indictment, after stating the information, the defendant being sworn, and his stating on his oath that he did not see Liversuch on the 12th August, 1843, then alleged the materiality thus, —that at the time the defendant was so sworn as aforesaid, it was material and necessary for the said T. S., being such justice as aforesaid, to inquire of and be informed whether the defendant did see Liversuch on the 12th August, in the year aforesaid: this was helden bad, because it was not stated to be material to that prosecution. *R. v. Bartholomew*, 1 Car. & K. 366. So, where an indictment for perjury on the trial of an information before magistrates, stated shortly the information, and the defendant's being sworn, and then averred the materiality thus:—"it became and was material to ascertain the truth of the matter hereinafter alleged to have been sworn to and stated by the said James Goodfellow, upon his oath;" and then stated the evidence: this was helden by Patteson, J., to be clearly bad, as it was absurd to say that it became material to ascertain the truth of what the witness stated, as the witness's statement must be given to ascertain the truth of something which had become material to the inquiry before the statement was made. *R. v. Goodfellow*, Car. & M. 509.

The evidence may be set out as continuous, notwithstanding that matter not material to be stated may intervene between the parts stated; for it is not necessary to set out the tenor, it is sufficient to state the substance of the false oath. *R. v. Callanan*, 6 B. & C. 102. So, where the witness gave his evidence in Welch, which was interpreted by a sworn interpreter, and taken down in English, and in an indictment for perjury, the English translation was set out; it was objected that it ought to be set out in Welch and then a translation in English: but Williams, J., held it sufficient; as it was only necessary to set out the substance, not the tenor of it, the matter sworn and the translation might be proved to be the substance of what was sworn. *R. v. Thomas*, 2 Car. & K. 866.

That the statement is false.] The matter sworn to, or some part of it, must be false. Or if a man swear to a fact, of which he knows nothing, he is guilty of perjury whether it be true or false. 1 *Hezek. c. 69, s. 6*. And the indictment must negative the matter sworn to, by special averment, "whereas

in truth and in fact," &c.,—in the same manner as in an indictment for false pretences. See *ante*, p. 464. Of these averments there may be several in the same count, according to the number of facts in the defendant's statement which can be proved to be false; and each averment is technically termed an assignment of perjury. And this must be stated with the same degree of certainty as any other part of the indictment, otherwise the defendant may demur. *R. v. Parker, Car. & M.* 699. If the statement sworn to, be of a particular fact, negating that fact will of course be sufficient. But if the statement be general, and the assignment as general in the negative,—as if a man swear that he has paid all his debts, and the assignment be that he has not paid all his debts,—this would be bad for want of certainty, as it would afford the defendant no information of what was intended to be proved, but the assignment must shew in what respect, or in what instances he has not done so. See *R. v. Parker, supra*. *R. v. Hopper, Ry. & M. N. P. C.* 210.

Innuendos.] Where any part of the statement sworn to, is of imperfect signification, and it is necessary to explain it, in order to show that according to the real meaning of it, it is false,—this is done by innuendo,—“meaning thereby,” &c., referring to something which is before stated in the indictment. And if in the ordinary mode of framing the indictment nothing would appear, to which the equivocal term could have reference, the matter to be referred to must be stated by way of inducement, at the commencement of the indictment. See *R. v. Horne, 2 Corop.* 673.

Conclusion.] The usual conclusion of the indictment at common law is thus:—And so the jurors aforesaid upon their oath aforesaid do say, that the said A. B., on —, before the said —, falsely, maliciously, wilfully, and wickedly, in manner and form aforesaid, did commit wilful and corrupt perjury; in contempt of our Lady the Queen and her laws; to the great damage of the said C. D., and against the peace of our Lady the Queen, her crown and dignity.

Form of an Indictment for Perjury at Common Law.

—) The jurors for our Lady the Queen, upon their
to wit.) oath present, that heretofore, to wit, on the —
day of —, in the year of our Lord —, a certain issue was
joined in the court of our said Lady the Queen before the
Queen herself, in a certain action, wherein one A. B. was
plaintiff and one C. D. the defendant; and that afterwards, to

wit, on the day and year aforesaid, at the sittings of *nisi prius* holden for the county of Middlesex, at Westminster, in the said county, before the Right Honourable John Lord Campbell, Lord Chief Justice of our Lady the Queen assigned to hold pleas in the said court of our Lady the Queen before the Queen herself, the said issue came on to be tried and was then tried in due form of law by a jury of the said county of Middlesex in that behalf duly taken and sworn between the said parties; and upon the said trial upon the issue aforesaid the said A. B. did then appear and tender himself and was received to give evidence on behalf of himself, the said A. B., as plaintiff as aforesaid; [or one E. F. did then appear and was produced as a witness on behalf of the said A. B., the plaintiff aforesaid]; and that the said A. B. did then before the said John Lord Campbell, Chief Justice as aforesaid, take his corporal oath, and was then duly sworn upon the Holy Gospel of God, that the evidence he the said A. B. should give to the court and jury sworn between the parties aforesaid, touching the matters in question in the said issue, should be the truth, the whole truth, and nothing but the truth; and then upon the trial of the said issue it became and was a material question in the same, whether [the said A. B. had delivered or caused to be delivered unto the said C. D. twenty bars of iron, for the price of which amongst other things the said action was brought]; and that thereupon the said A. B. being so sworn as aforesaid, devising and wickedly intending to cause and procure a verdict to pass for him the said A. B., did then, to wit, on the day and year aforesaid, upon the trial aforesaid, before the said John Lord Campbell, the Chief Justice aforesaid, falsely, maliciously, wilfully, wickedly, and corruptly, and by his own proper act and consent, upon his oath aforesaid, depose, swear, and give evidence to the jurors so sworn as aforesaid, amongst other things in substance and to the effect following, that is to say: [that he the said A. B. ordered E. F. his carter to take twenty bars of iron (meaning thereby the twenty bars of iron hereinbefore mentioned) to the shop of the said C. D., and that the said E. F. accordingly took the said twenty bars of iron to the shop of the said C. D., and that he the said A. B. accompanied him to the shop of the said C. D., and saw the said E. F. deliver the same to the said C. D.]: 'whereas in truth and in fact [the said E. F. did not, nor did any other person, take the said bars of iron or any of them or any part thereof to the shop of the said C. D., or deliver the same or any part thereof to the said C. D.; and whereas in truth and in fact the said A. B. did not upon the occasion aforesaid accompany the said E. F. to the shop of the said C. D.; and whereas in truth and in fact, the said A. B. did not see the said E. F. deliver the said bars of iron or any of them or any part thereof to the said C. D.]; and so the jurors aforesaid upon their

oath aforesaid do say that the said A. B., on the trial of the said issue, on the day and year aforesaid, before the said John Lord Campbell, Chief Justice as aforesaid, falsely, maliciously, wilfully, and wickedly, in manner and form aforesaid, did commit wilful and corrupt perjury: in contempt of our Lady the Queen, to the great damage of the said C. D., and against the peace of our said Lady the Queen, her crown and dignity. [*Two or more persons cannot be included in the same indictment.* R. v. Philips et al., 2 Str. 921.

Misdemeanor; transportation for seven years;—or imprisonment [and hard labour, 3 G. 4, c. 114] for not more than seven years. 2 G. 2, c. 25, s. 2. Subornation of perjury the same. Id. Perjury under the stat. 5 Eliz. c. 9, the same. Id.

Inciting a person to commit perjury, which is not afterwards committed, is a misdemeanor, punishable with fine, imprisonment, or both. Making a false declaration, where a declaration may be taken instead of an oath, the same punishment. 5 & 6 W. 4, c. 62, s. 21. Costs, ante, p. 187.

Evidence.

To maintain this indictment, the prosecutor must prove—

1. The judicial proceeding, in the course of which the perjury was committed.

If it took place at nisi prius, the nisi prius record, with the postea indorsed upon it, and regularly stamped and marked, 1 Str. 162, or even with the officer's memorandum of the verdict upon it, R. v. Browne, Me. & M. 315, will be sufficient. Where an indictment for perjury stated that the judgment in an action was entered up, the book kept at the judgment office, in which an incipitur of the judgment was entered, was holden to be sufficient evidence of it. R. v. Gordon, Car. & M. 410.

If the perjury took place upon the trial of an indictment, it is enacted by stat 14 & 15 Vict. c. 100, s. 22, that "a certificate containing the substance and effect only (omitting the formal part) of the indictment and trial for any felony or misdemeanor, purporting to be signed by the clerk of the court or other officer having the custody of the records of the court where such indictment was tried, or by the deputy of such clerk or other officer, (for which certificate a fee of six shillings and eight pence and no more shall be demanded or taken,) shall upon the trial of any indictment for perjury or subornation of perjury be sufficient evidence of the trial of such indictment for felony or misdemeanor, without proof of

the signature or official character of the person appearing to have signed the same."

If the perjury took place in an answer to a bill in equity, an examined copy of the bill must be put in, and the answer itself produced.

If it took place upon the hearing of an information before justices of the peace, if the information were in writing, it must be produced, or at least an examined copy of it proved; and if the statute on which it was framed require it to be upon oath, it must be proved that it was duly sworn to. But if it were not in writing, then of course parol evidence may be given of it. But the conviction upon the information is not evidence in such a case; *R. v. Goodfellow et al.*, *Car. & M.* 569; unless it recite the information, and in that case it is evidence of the information. *5 Car. & P.* 38. *See ante*, p. 142.

If the perjury took place in the course of an appeal to a court of quarter sessions, it seems that the record must be made up, and it or an examined copy of it given in evidence. Where the sessions book was produced in such a case, but the clerk of the peace said that he would have made up the record on parchment if it had been bespoken, Parke, J., refused to receive the book as evidence. *R. v. Ward*, *6 Car. & P.* 366. But on the other hand where the entry in the sessions book had a regular caption, and was in the present tense, and in every other respect as a record, and it was proved that no other record ever was made up, the court held that the book was legal evidence of the proceedings and order. *R. v. Yeovley*, *8 Law J. 9 m.* *Ante*, p. 142.

If the perjury took place in the course of a suit in the ecclesiastical court, the pendency of the suit is sufficiently proved by producing the original allegation of the parties from the registrar's office, signed by their respective advocates, proof being given of the advocates' signatures, and that they were advocates of the court. *R. v. Turner*, *2 Car. & K.* 732.

Where the perjury is assigned upon an affidavit, the affidavit must be produced, and the defendant's signature to it proved.

2. It must be proved (if the court will not take judicial cognizance of it) that the court or person before whom the false statement was made, had jurisdiction of the matter in which it was received, and had authority to administer the oath. If the proceeding were in the superior courts, no evidence of its jurisdiction need be given, for the reason mentioned *ante*, p. 594; but it is otherwise with respect to an inferior court, unless the jurisdiction be defined by some public Act of parliament. As to the power to administer an oath, we have seen (*ante*, p. 594) that all judges and persons

having authority "to hear, receive, and examine evidence," have authority to administer an oath to the witnesses. 14 & 15 Vict. c. 90, s. 16. In the case of an affidavit sworn before a commissioner, it is sufficient for the commissioner to prove that he acts as such. See *ante*, p. 595.

3. That the oath was administered to, and taken by the defendant. This may be proved by any person who was present at the time; except in cases where the false matter is stated by way of deposition in writing, as in answers to bills or interrogatories in equity, affidavits, and depositions before magistrates, where proof of the signature of the officer or justice to the jurat, and of the defendant's signature to the instrument, are conclusive evidence of the defendant's having been sworn to it. And where the jurat to an affidavit, made in the court of Queen's Bench, was "sworn in open court, Westminster Hall, the 10th day of June, 1846," and was signed with the words "by the court," by one of the masters of that court, proof that the words "by the court" were in the master's hand-writing, with proof of the signature of the defendant, were holden by Erle, J., to be good evidence of the affidavit, and that the defendant was duly sworn to it. *R. v. Turner*, 2 Car. & K. 762. If the affidavit be signed by a mesne-man, the jurat should state that the affidavit was read over to him and that he appeared perfectly to understand the same, in which case the court will give credit to the jurat, without further proof, except perhaps proof of identity; but if the jurat do not express it, the fact must be proved, and Littledale, J., in such a case said he should have a difficulty in receiving the evidence of any person but the officer before whom the affidavit was sworn, to that fact. *R. v. Hailey*, Ry. & M. 24. Where a deposition before a magistrate is given in evidence, the court will not receive evidence of any other matter stated by the defendant at the same time, and which is not contained in the deposition. *R. v. Wyldes*, 6 Car. & P. 380.

4. The matter sworn. The whole matter set out in the indictment as sworn must be proved to have been sworn, although perjury be assigned only on a portion of it. *R. v. Leefe*, 2 Camp. 134. It is not necessary to prove it literally, but it must be proved substantially. *Id.* In answers to bills in equity and interrogatories, in affidavits and depositions, the matter sworn appears upon the face of the written instrument, and is proved by proving that, as above mentioned. And if there be any variance between the statement and the proof, the indictment may be amended. *Ante*, p. 100. *R. v. Newton*, 1 Car. & K. 469. But in other cases where the evidence is given *vide voce*, the matter sworn may be proved by any person who was present and heard it, and can speak to it from

memory, or from having made a memorandum of it at the time, or shortly afterwards and whilst it was fresh in his memory. But the judge, or the chairman of a court of quarter sessions, before whom the evidence was given, shall not be called as a witness to prove it. *R. v. Gazard*, 8 Car. & P. 595.

5. The assignments of perjury, or some one of them must be proved; and the matter proved to be false must appear material in the judicial proceeding in which it was stated. All the facts of the case in perjury,—the taking of the oath, the facts deposed to—all except the falsity of the statement, may be proved by a single witness; 2 Hatch. c. 46, s. 10; but the falsity of the fact the defendant is charged to have sworn to, must be proved by two witnesses, or at least by one witness and circumstances so confirmatory of his testimony as to be equivalent to the testimony of another; for otherwise there would be merely oath against oath. Where the defendant swore that he paid all the debts proved under his bankruptcy except a debt to A. and another to B., and upon an indictment against him for perjury, C. proved that he proved a debt and that it was not paid, and D. and several other creditors proved the like: this was held to be insufficient, for the non-payment of each debt should be proved by two witnesses. *R. v. Parker*, Car. & M. 639. But where the defendant was indicted for swearing that one Prosser came to his house at seven o'clock in the morning of a certain day, and that they walked together to Worcester, where they arrived at ten o'clock, and that Prosser was never out of his sight the whole of that time; and in the proof of the perjury, one witness proved that she saw Prosser at A. at half-past eight on that morning, and another witness swore that he saw the defendant, on foot, at nine o'clock on that morning at B., which was six miles distant from A.; this was objected to as there were not two witnesses to each of the facts proved: but Patteson, J., held it to be sufficient; that although it was necessary to have two witnesses to prove an assignment of perjury, it was not necessary to have two witnesses to every fact constituting such assignment. *R. v. Roberts*, 3 Car. & K. 607. Where perjury was assigned upon the affidavit of an attorney, in showing cause against a rule to refer his bill to be taxed, and the falsity was proved by one witness, and it was proposed to put in the defendant's bill of costs, to show an admission in it to the same effect; but this was objected to, as the bill, not being an oath, was not equivalent to the oath of a second witness: but Ld. Denman; C. J., held it to be quite sufficient, and that even a letter of the defendant, contradictory of the statement in his affidavit, would be sufficient to dispense with the necessity of a second witness. *R. v. Mayhew*, 6 Car. & P. 315. So,

where the defendant was indicted for perjury in his evidence before a committee of the House of Lords, and it was proved by one witness that he had recently given evidence directly to the contrary before a committee of the House of Commons: this was holden to be sufficient. *R. v. Knill*, 5 B. & A. 929 n. Where the defendant was indicted for perjury, in making a charge on oath against J. S., in which he swore that he saw him commit an unnatural offence, and saw the flap of his trousers down; and in proof of the perjury, J. S. proved the charge to be false, and his brother proved that at the time mentioned J. S. had been absent from him only three minutes, and that the trousers he then had on (and which were produced) had no flap: Patterson, J., held it to be sufficient, and the defendant was convicted; and the judges held the conviction to be right. *R. v. Gardiner*, 8 Moody, 95. But if the evidence be confirmatory of the witness in some slight particulars only, it will not be sufficient. *R. v. Yates*, Car. & M. 132. If it appear that the witnesses are interested in proving the perjury, it is no objection whatever to their competency: 6 & 7 Vict. c. 85, s. 1, *ante*, p. 151; it goes merely to their credit.

The evidence or statement on which the perjury is assigned, must appear, or be proved, to be material to the judicial proceeding in which it was given. *See ante*, p. .

Subornation of Perjury, &c.

By stat. 14 & 15 Vict. c. 100, s. 21, "in every indictment for subornation of perjury,—or for corrupt bargaining or contracting with any person to commit wilful and corrupt perjury,—or for inciting, causing, or procuring any person unlawfully, wilfully, falsely, fraudulently, deceitfully, maliciously, or corruptly to take, make, sign, or subscribe any oath, affirmation, declaration, affidavit, deposition, bill, answer, notice, certificate, or other writing,—it shall be sufficient, wherever such perjury or other offence aforesaid shall have been actually committed, to allege the offence of the person who actually committed such perjury or other offence in the manner herein-before mentioned, (s. 20, *ante*, p. 594,) and then to allege that the defendant unlawfully, wilfully, and corruptly did cause and procure the said person the said offence, in manner and form aforesaid, to do and commit;—and wherever such perjury or other offence aforesaid shall not have been actually committed, it shall be sufficient to set forth the substance of the offence charged upon the defendant, without setting forth or averring any of the matters or things herein-before (s. 20, *ante*, p. 594,) rendered unnecessary to be set forth or averred in the case of wilful and corrupt perjury."

SECTION VI.

*Nuisance.**Indictment for carrying on an Offensive Trade near a Highway.*

——— } The jurors for our Lady the Queen, upon their
 to wit. } oath present, that A. B., on the ——— day of ———,
 in the year of our Lord ———, and on divers other days and
 times between that day and the day of the taking of this in-
 quisition, near unto the dwelling-houses of divers liege subjects
 of our Lady the Queen, and also near unto a certain public
 and common highway, in the parish of ———, in the county of
 ———, for all the subjects of our said Lady the Queen, with
 coaches, carriages, horses, waggons, carts, goods, chattels, and
 merchandizes, to go, return, and pass at their will and plea-
 sure, unlawfully and injuriously did kill and cause to be killed
 one hundred sheep, and the excrements, blood, entrails, and
 other filth coming from the said sheep, did then and on the
 said other days and times cause and permit to lie, be, and re-
 main on the said public and common highway for a long
 space of time, to wit, for the space of one week, whereby divers
 noisome and unwholsome smells, from the said excrements,
 blood, entrails, and other filth, then and on the said other
 days and times did arise, so that the air was then and on the
 said other days and times greatly corrupted and infected: to
 the great damage and common nuisance, not only of all the
 liege subjects of our Lady the Queen near the same place in-
 habiting, being, and residing, but also of all the liege subjects
 of our said Lady the Queen, going and returning, passing and
 repassing, along, by, and through the said public and common
 highway, to the evil example of all others in the like case
 offending, and against the peace of our said Lady the Queen,
 her crown and dignity. [See 4 Went. 224. *Where the
 nuisance is of a permanent nature, it is usual, and indeed
 prudent, to add a count for continuing it, if you are
 not certain of being able to prove that the defendant first
 created it.*

Misdemeanor ; fine or imprisonment, or both.

Evidence.

To maintain this indictment, the prosecutor must prove the nuisance as laid. Erecting buildings near a highway, and near to the dwelling-houses of several persons, and there manufacturing the acid spirit of sulphur, whereby the air was

impregnated with noisome and offensive smells, which were proved to be noxious and hurtful to the health of the inhabitants, and to have made many of them sick,—was holden to be a nuisance. *R. v. White and Ward*, 1 Burr. 333. As to erecting privies near a highway, see *R. v. Pedley*, 1 Ad. & El. 822, *infra*; as to nuisances by gas works, see *R. v. Medley et al.*, 6 Car. & P. 292; as to keeping a shooting ground near the highway, where persons came to shoot at targets, and at pigeons, &c., see *R. v. Moore*, 3 B. & Ad. 184. And the nuisance, to be indictable, must appear to be a public nuisance. Therefore where a tinman was indicted for carrying on his trade in the neighbourhood of Clifford's Inn, to the common nuisance, &c., and it was proved that the noise he made was a great annoyance to some attornies having chambers at No. 14, 15, and 16 in the inn, and prevented them attending to their business: *Ld. Ellenborough, C. J.*, held that the evidence did not sustain the indictment, the nuisance proved being a private nuisance merely, *R. v. Lloyd*, 4 Esp. 200. So, where a person was indicted for erecting a coke oven, which threw out great quantities of smoke and vapour, which was proved to be offensive to the inhabitants of the houses in the neighbourhood, but it did not affect their health, or render their houses uninhabitable, or even lower the value of their houses: *Heath, J.*, held that it was not a public nuisance. *R. v. Davey et al.*, 5 Esp. 217. Where a man was indicted for carrying on an offensive trade, but it appeared that it had been carried on at the same place by the defendant, and previously by his father, for nearly fifty years: *Ld. Kenyon, C. J.*, directed the jury to acquit him. *R. v. Samuel Neville, Peake*, 128, but see *R. v. Cross*, 3 Camp. 227. And where upon an indictment for this offence, it appeared that there had been other manufactories, which emitted disagreeable and noxious smells, carried on in the neighbourhood for many years, and that the defendant had come into the neighbourhood about four years before: *Ld. Kenyon* left it to the jury to say whether the noxious vapour was much increased by this addition of the defendant; and his lordship said,—“where manufactories have been borne with in a neighbourhood for many years, it will operate as a consent of the inhabitants to their being carried on, though the law might have considered them as nuisances, had they been objected to in time; but if another man comes, and by his manufacture renders that which was a little unpleasant before, very disagreeable and uncomfortable, though it would not amount to a nuisance by itself, still he is answerable for it.” *R. v. Bartholomew Neville, Peake*, 125. This, however, as a general proposition, may very much be doubted; if a man erect a public nuisance near a highway, inasmuch as it is a nuisance to all the Queen's subjects, the consent of the inhabitants in

its immediate neighbourhood cannot legalize it. This doctrine of *Ld. Kenyon* seems more applicable to private nuisances than to public ones. Where a man, after building some dwelling-houses, built necessary-houses near the highway to be used with them, and then let the houses; afterwards these necessary-houses, for want of cleansing, became a nuisance; but it did not appear clearly whether the necessary-houses had been let with the houses, or whether the tenants were under any contract to keep them cleansed, &c.; or not: the court however held, that whether that was the case or not, the defendant was liable to this indictment; he made the erection, and the nuisance was the natural consequence of the erection; and *Littledale, J.*, said, "if a nuisance be created, and a man purchase the premises with the nuisance upon them, though there be a demise for a term at the time of the purchase, so that the purchaser has no opportunity of removing the nuisance, yet by purchasing the reversion he makes himself liable for the nuisance; but if the nuisance be erected by the occupier after the reversion is purchased, the reversioner incurs no liability; yet in such a case, if there were only a tenancy from year to year, or any short period, and the landlord chose to renew the tenancy after the tenant had erected the nuisance, that would make the landlord liable; he is not to let the land with the nuisance upon it. *R. v. Pedley*, 1 *Ad. & El.* 822. Where a man was indicted for a nuisance in having refused and neglected to bury the dead body of his child, and by reason of the decomposition thereof divers noisome stenches arose, and the air was greatly infected and rendered unwholesome, to the common nuisance, &c.; it appeared that the defendant was a pauper, and upon the death of his child he applied to the parish officers for money to bury it, who offered to let him have it on loan (being the only mode in which they are permitted to afford such relief,) but this he refused, and carried the body from his house to a yard in the neighbourhood, where it became a nuisance as stated in the indictment; being convicted, and the case reserved for the opinion of the criminal appeal court, that court held that although a man is bound to provide christian burial for his deceased child, if he be able to do so, yet he is not bound to incur a debt for that purpose; and as the jury were not desired to consider and say whether the defendant was of ability to bury the child without incurring the debt, he ought not to have been convicted. *R. v. Vann*, 21 *Law J.* 39 *m.*

SECTION VII.

Bigamy.

Indictment.

— } The jurors for our Lady the Queen, upon their
to wit. } oath present, that A. B., on the — day of —,
in the year of our Lord —, did marry one C. D., and her
the said C. D. then had for his wife; and that the said A. B.,
being so married to the said C., as aforesaid, afterwards and
during the life of the said C., his wife, to wit, on —, fel-
lously did marry one B. F., the said C., his former wife, being
then alive, as aforesaid: against the form of the statute in such
case made and provided, and against the peace of our Lady
the Queen, her crown and dignity. [*As to the venue, see
ante, p. 74. Where the indictment charged the prisoner
with marrying "Elizabeth Chant, widow," his former wife
being alive; and it appeared that Elizabeth Chant was at
the time in fact and by reputation a single woman: the
judges held the misdescription to be fatal, although it was
not necessary to have stated more than the name of the
party. R. v. Deeby, Ry. & M. 503, 4 Car. & P. 579. But
it seems that this might now be amended by stat. 14 & 15
Vict c. 100, s. 1, ante, p. 100.*

*Felony; transportation for seven years;—or imprison-
ment, with or without hard labour, for not more than two
years. 9 G. 4, c. 31, s. 22.*

Evidence.

To maintain this indictment, the prosecutor must prove—

1 The first and second marriages, as stated in the indict-
ment.

A marriage in a protestant church, is by licence or banns,
or by a certificate from a superintendent-registrar of marriages.
By licence, each party should be of the age of twenty-one,
otherwise, he or she (if not a widower or a widow) should
have the consent of his or her father, or (if dead) of the
guardian, or (if no guardian) of the mother unmarried, or (if
no mother unmarried) of a guardian appointed by the court of
chancery: 4 G. 4, c. 76, ss. 14, 16; but since this latter
statute, the want of such consent does not render the marriage
void. *R. v. Birmingham*, 8 B. & C. 29. It is required
also that the parties should be previously resident in the

parish for fifteen days; 4 G. 4. c. 76, s. 10; but such residence is not essential to the validity of the marriage. *Id.* s. 16. And if the licence be granted to the parties by the names by which they are usually known, the marriage will be valid, although those be not their real names. *R. v. Burton upon Trent*, 3 M. & S. 537. *Lane v. Goodwin*, 12 Law J. 157, qb. Persons of any age may be married by banns; and it is no objection to the validity of the marriage, that the parties had not been previously resident in the parish. 4 G. 4, c. 76, s. 26. *R. v. Hind*, R. & Ry. 253. If the banns be in the names by which the parties are usually known, the marriage will be valid; *R. v. Billinghamurst*, 3 M. & S. 250. *R. v. St. Faith's, Newton*, 3 D. & Ry. 348; or if the banns name one of the parties falsely, yet unless both parties had a knowledge of it, the marriage will be valid; *R. v. Wroxtton*, 4 B. & Ad. 640; but a marriage by banns in a false name, or in a name by which the party was never known or called by, although it be the name in the register of his or her baptism, if this fact were known to both parties, the marriage would be invalid. *R. v. Tibshelf*, 1 B. & Ad. 190. But where the man, in the note for the publication of the banns, named the woman, Anna Timson (her name being Susanna), and she was married and signed the register as Anna, the judges held that as he had written the name Anna in the note for the publication of banns, and signed the register which so described her, he should not be permitted to defend himself on the ground of his not having married Anna Timson, although such might not be her real name. *R. v. Edwards*, R. & Ry. 283. Or instead of banns or licence, the parties may be married, on production of a certificate from a superintendent-registrar of marriages. 6 & 7 W. 4, c. 85, ss. 1, 16. 3 & 4 Vict. c. 72, s. 1.

A marriage in a protestant chapel, is by licence or banns, in the same manner as in a church; but if in a chapel erected since the passing of stat. 6 G. 4, c. 92, or indeed in a church built in a new district since that time (that statute having legalized all marriages in churches or chapels up to the time of the passing of it), it must also be proved that the bishop of the diocese has authorized the publication of banns and celebration of marriages there. See *R. v. Bowen*, 2 Car. & K. 227; and stat. 6 & 7 W. 4, c. 85, ss. 26—34; 7 & 8 Vict. c. 56.

A marriage in a chapel of dissenters of any denomination (registered for the solemnization of marriages, by the registrar-general, 6 & 7 W. 4, c. 85, s. 18) by licence or certificate from a superintendent-registrar, is good and valid; *Id.* ss. 11, 17, 36; and it is not necessary to the validity of the marriage, that the parties should have previously resided within the district. *Id.* s. 25.

A marriage by the like licence or certificate, in the office of a superintendent-registrar of marriages, in his presence, and in the presence of some registrar of the district, and of two witnesses, with open doors, between the hours of eight and twelve in the forenoon, is also good and valid. 6 & 7 W. 4, c. 85, ss. 20, 21.

Marriages by Quakers or Jews, must now be by certificate from a superintendent-registrar of marriages; 6 & 7 W. 4, c. 85, s. 4; but in every other respect Quakers and Jews may contract and solemnize marriage according to their respective usages, and such marriage is valid, provided both the parties be Quakers, or both parties Jews. *Id.* s. 2. And all marriages of Quakers or Jews before that Act, are declared to be valid by stat. 10 & 11 Vict. c. 58.

A marriage in Scotland is a mere civil contract, which may be made and proved as all other contracts. And the contract may be either in writing or verbal: if for instance, the parties say, in the presence of a witness or witnesses, that they are man and wife, this is an admission of their marriage, and will be deemed sufficient proof of it. Where, in a suit in the ecclesiastical court in this country, for a restitution of conjugal rights, it was proved that the parties had entered into a mutual written promise to marry, and both afterwards signed a declaration and acknowledgment that they were husband and wife, which however was done privately between themselves, without the knowledge of any third person: this was holden to be a valid marriage, because it was so according to the law of Scotland. *Dalrymple v. Dalrymple*, 2 Haggard, 54. And the same is the law, although both parties be English. *Crompton v. Bearcroft*, *Bul. N.P.* 113.

A marriage in a foreign country, if contracted or solemnized according to the law of such foreign country, is deemed a valid marriage here; it is valid or invalid in this country, according as it was valid or invalid by the law of the country in which it was contracted. *Per* *Ld. Tenterden, C.J.*, in *Lacon v. Higgins*, 3 Stark. 178. And therefore where it was proved that certain formalities were required to the validity of a marriage by the law of a foreign country, and that some of those formalities were omitted to be observed upon the occasion of the marriage in question, Lord Tenterden, C.J., held the marriage to be void. *Id.* As to marriages in Ireland, see *R. v. Jacobs*, Ry. & M. 140; and as to marriages there by presbyterian or other dissenting ministers, see stat. 5 & 6 Vict. c. 113. 6 & 7 Vict. c. 39. Whilst the British army were in possession of St. Domingo, a British soldier was married to an English woman, in a chapel there, by a person habited as a priest; the ceremony was performed in the French language, was interpreted to them, and the woman afterwards, in giving evidence upon the subject, stated that

she understood it to be the marriage service of the church of England; they also gave her a certificate of the marriage, but she had lost it: the court held the marriage to be valid; the British troops being in possession of the place, the English law then prevailed there; and this marriage being *per verba de presenti*, and performed by a person who must be presumed to have been a clergyman (whether of the English or Roman catholic faith was immaterial) was a valid marriage there by the law of England, independently of the marriage Act, which does not extend to colonies. *R. v. Brampton*, 10 East, 282. Also, for relieving doubts as to the validity of marriages in the chapel house of a British ambassador or minister, or in the chapel belonging to a British factory abroad, or in the house of any British subject residing in such factory, or solemnized within the British lines by any chaplain, or officer or other person officiating under the orders of the commanding officer,—it is enacted that all such marriages shall be deemed valid in law, as if they had been duly solemnized within Her Majesty's dominions. 4 G. 4, c. 91, s. 1. Also, a marriage before a British consul abroad, solemnized in the manner directed by stat. 12 & 13 Vict. c. 68, between persons both or one of whom is a British subject, shall be deemed and held to be as valid in law as if the same had been solemnized within Her Majesty's dominions, with a due observance of all forms required by law. 12 & 13 Vict. c. 68, ss. 1, 9.

The actual marriage must be proved; no evidence of reputation merely, or of the parties having lived together as husband and wife, will be sufficient. See *Morris v. Miller*, 4 Burr. 2057, 1 W. Bl. 682. This may be proved by any person who was actually present at it, and saw the ceremony performed, and can identify the parties; and this will be deemed sufficient, without proof of the registration of the marriage, or of any licence, or publication of banns, &c. *R. v. Allison, alias Wilkinson*, R. & Ry. 109. And the second wife is a competent person to prove the marriage; the first, not. The admission of the first marriage by the prisoner, is not of itself sufficient evidence; *R. v. Flaherty*, 2 Car. & K. 782; at least, not unless the admission comprise all the facts necessary to constitute a legal marriage. *R. v. Simonsto*, Car. & M. 184. If there be any variance between the indictment and proof in the names of the parties, the indictment may be amended. 14 & 15 Vict. c. 100, s. 1; *ante*, p. 100.

It is immaterial where the first marriage was solemnized; but if the second marriage were contracted out of England, it must be proved that the defendant was then a British subject. See 9 G. 4, c. 31, s. 22. If either marriage were in a foreign country, proof that it was solemnized in the manner usual in that country, will be good presumptive proof that it was a

valid marriage. *Lacen v. Higgins*, 8 Stark. 178. If it be necessary however to prove the law of the foreign country in this respect, it must be proved by some person, who from his profession or office has a competent knowledge of the subject; and he may refer to foreign law books to refresh his memory or confirm his opinion, but the law itself must be taken from his evidence. *Sussex Peerage case*, 11 Cl. & Fin. 85, 134; and see 1 Car. & K. 751. In this country it must be in a church or chapel, unless it have been by special licence, or that both the parties are Quakers or Jews; and if the church have been built in a new district, or the chapel erected, since the passing of stat. 6 G. 4, c. 92, we have seen (*ante*, p. 611) that it must also be proved that the bishop of the diocese had authorized the publication of banns and the celebration of marriages in it.

2. It must be proved that the first wife or husband was alive, at the time of the second marriage. And a letter received from abroad in her or his handwriting, is evidence of the party being alive at the time the letter appears to have been written. *Reed v. Norman*, 8 Car. & P. 65.

But the statute (9 G. 4, c. 81, s. 22) excepts from its operation—"any person marrying a second time, whose husband or wife shall have been continually absent from such person for the space of seven years then last past, and shall not have been known by such person to be living within that time;" (see *R. v. Thomas Jones*, Car. & M. 614);—also, "any person, who at the time of such second marriage, shall have been divorced from the bond of the first marriage;"—also "any person whose former marriage shall have been declared void by the sentence of any court of competent jurisdiction." As to this last exception, however, it has been holden that where the first marriage was in England, a Scotch divorce, *à vinculo*, for adultery, was no defence to an indictment for bigamy in afterwards marrying a second time; because no sentence or act of any foreign country or state can dissolve an English marriage *à vinculo matrimonii*, for a ground on which it is not liable to be dissolved in England. *R. v. Lolley*, R. & Ry. 237.

But it is no defence that the second marriage was void. And therefore where a married woman married the widower of her deceased sister, and, being indicted for bigamy, it was objected that the marriage was void by stat. 5 & 6 W. 4, c. 64, s. 2, *Ld. Denman*, C.J., held it to be no defence; for if it were so, there could be no conviction for bigamy, inasmuch as the second marriage is in all cases void; and the man in that case being indicted also, as accessory before the fact, his Lordship held that if he knew that the

woman was married, and her husband alive, and that he incited or advised her to marry, he was guilty ; they were both convicted. *R. v. Braton and Webb*, 1 Car. & K. 144.

CHAPTER IV.

Conspiracy.

Indictment.

----- } The jurors for our Lady the Queen, upon their
to wit. } oath present, that A. B., B. F., G. H., and J. K.,
wickedly devising and intending to defraud one C. D., on the
----- day of -----, in the year of our Lord -----, did amongst
themselves unlawfully conspire, combine, confederate, and
agree together, falsely and fraudulently to [cheat and defraud
the said C. D. of a certain large sum of money, to wit, the
sum of £-----, under the false and fraudulent pretence that
the said A. B., in consideration of such sum of money, would
secure and had the means of securing unto the said C. D., his
executors, administrators, and assigns, a certain annuity, to
wit, an annuity of £-----, to be payable during the natural
life of the said A. B.]: And the jurors aforesaid, upon their
oath aforesaid do further present, that in pursuance of and
according to the said conspiracy, combination, confederacy,
and agreement amongst themselves, so had as aforesaid, the
said B. F. afterwards, to wit, on -----, [*here state the overt
acts by each of the conspirators, or by two or more of them
jointly, or by one of them* "in the presence and hearing and
with the knowledge and consent" of the others; *commencing
the statement of each overt act thus*: "And the jurors aforesaid,
upon their oath aforesaid do further present, that in
further pursuance of," &c., *ut supra*; and concluding the
count thus]: To the great damage of the said C. D., and
against the peace of our Lady the Queen, her crown and
dignity. [*See the precedent, 4 Went. 8. And 6 Went. Index,
tit. "Conspiracy."* Add a general count, the same as the
above, but omitting the overt acts. Also, if necessary, you
may add other counts with overt acts, varying the statement
of the conspiracy, with corresponding general counts without
overt acts.

As to the general counts above recommended:—In strictness, it is not necessary to insert overt acts at all, in an indictment for a conspiracy; the conspiring to effect an unlawful purpose, or a lawful purpose by unlawful means, is the offence in law, and the overt acts or means used by the

parties to effect it, are merely matter of evidence to prove the charge, and not the crime itself. See *R. v. Becket*, 1 Leach, 274. Where the indictment charged that the defendants "did conspire and combine together, by divers false pretences and subtle means and devices, to obtain and acquire to themselves of and from P. D. and G. D. divers large sums of the said P. D. and G. D., and to cheat and defraud them respectively thereof," without adding overt acts: the court held the indictment to be sufficient; it was possible to conceive that the parties might meet together, and determine by some trick or device to cheat and defraud another, without at that time fixing or settling what the particular means or devices should be; and yet such a meeting would constitute an offence. *R. v. Gill and Henry*, 2 B. & Ald. 204. Where the conspiracy was laid, to cheat and defraud "Jonas Donkersley and others," it was held that this meant Donkersley and his partners only, and that the prosecutor could not give evidence of a conspiracy to defraud any persons unconnected with Donkersley. *R. v. Steel*, Car. & M. 337. Where the conspiracy laid, was "to cheat and defraud the just and lawful creditors" of one of the defendants, and there were no overt acts laid, *Ld. Tenterden, C. J.*, seemed to think the charge too general, as the indictment did not state what was intended to be done, or who were to be defrauded; but he said he would not stop the trial upon that point; the defendants however were afterwards acquitted. *R. v. Powle and Elliott*, 4 Car. & P. 592. So, where the defendants were charged with having conspired, &c., "by divers false, artful, and subtle stratagems and contrivances, as much as in them lay, to injure, oppress, aggrieve, and impoverish E. W. and T. W., and to cheat and defraud them of their monies,"—the defendants being convicted, the court of King's Bench held the indictment to be too general, and arrested the judgment. *R. v. Biers et al.*, 1 Ad. & El. 327. And an indictment for conspiring to obtain, and obtaining, goods by fraud, must state whose goods they were. *R. v. Parker*, 11 Law J. 102 m, and MS. But where the indictment charged the defendants with conspiring to propagate false reports that Bonaparte was killed, and that peace would soon be made between England and France, and by such reports to cause a rise in the prices of the government funds and securities, with a wicked intention to injure "all the subjects of the King" who should on that day purchase such funds or securities: it was objected that this was bad for uncertainty, in not stating the individuals by name who were intended to be injured; but the court held that there was nothing in the objection, *Ld. Ellenborough* saying that the defendants, at the time of the conspiracy, could not, except by a spirit of prophecy, divine

dictment should be brought up for judgment, this was a conspiracy to pervert the course of justice, by producing in evidence a false certificate, and a greater crime could hardly be stated. *R. v. Mawbey et al.*, 6 T. R. 619. An indictment however will not lie for a conspiracy to commit a mere civil trespass, as snaring hares in a preserve, although alleged to be done in the night by persons armed with offensive weapons for the purpose of resisting any persons opposing them. *R. v. Turner*, 13 East, 228. So, where two persons were indicted for conspiring to sell the prosecutor an unsound horse, *Ld. Ellenborough, C. J.*, held that it was not the subject of an indictment, but merely of an action on the warranty. *R. v. Pywell et al.*, 1 Stark. 402. So, where an indictment charged a conspiracy to deprive a man of the office of secretary to an illegal unincorporated company, *Ld. Ellenborough, C. J.*, held that it would not lie; so far from having an interest in the office, the prosecutor himself was guilty of a crime by executing the duties of it. *R. v. Stratton et al.*, 1 Camp. 549 n.

The venue may be laid in any county, in which a distinct act of conspiracy was committed. *R. v. Brisac and Scott*, 4 East, 164, 170. See ante, p. 72.

Misdemeanor; fine or imprisonment, or both; and the imprisonment may be with hard labour for the whole or any part of the time, where the conspiracy is "to cheat or defraud,—or to extort money or goods,—or falsely to accuse of any crime,—or to obstruct, prevent, pervert, or defeat the course of public justice." 14 & 15 Vict. c. 100, s. 29. Costs, see ante, p. 187.

Evidence.

To maintain this indictment, the prosecutor must prove—

1. Any facts necessarily stated in the indictment by way of inducement. And if the matter thus stated cannot be rejected as surplusage, a failure in the proof of it, will be as fatal as in proof of the conspiracy itself. Where an indictment for a conspiracy stated that an indictment had been preferred at the quarter sessions and found by the grand jury; and in order to prove this allegation, the indictment itself was produced, together with the minute book at the sessions, and were received as sufficient evidence by the judge at the trial: but the court afterwards granted a new trial, holding that the indictment and book were not evidence; in order to prove the allegation, the record should have been made up, and an examined copy produced and proved. *R. v. Smith et al.*, 8 B. & C. 341. So, where it was stated as inducement in such an indictment, that a certain statute was passed in the

second and third years of the reign of William IV., and the defendant was convicted: the court upon motion arrested the judgment for this error, for an Act of parliament cannot be said to be passed in two years, but must be pleaded of that year in which it was actually passed. *R. v. Biers et al.*, 1 *Ad. & El.* 327. In the present indictment there is no inducement stated; but the above observations are made with reference to cases of this description generally.

2. The conspiracy. A conspiracy is proved, either expressly, or by the proof of facts from which the jury may infer it. It is seldom proved expressly; nor can a case easily be imagined in which that is likely to occur, unless where one of the persons implicated in the conspiracy consents to be examined as a witness for the prosecution. In nearly all cases therefore the conspiracy is proved by circumstantial evidence, namely, by proof of facts from which the jury may fairly imply it. It is usual to begin by showing that the defendants all knew each other, and that a certain degree of intimacy existed between them, so as to show that their conspiring together is not improbable; and if to this can be added evidence of any consultations or private meetings between them, there is then a strong foundation for the evidence to be subsequently given, namely, of the overt acts of each of the defendants, in furtherance of the common design. But although the proof above mentioned is desirable, because it satisfies the jury as you proceed, and they are better able to apply the evidence of the overt acts, when it is afterwards given: yet it is not essentially necessary, as the jury may imply the conspiracy of all, from the overt acts of each. In *R. v. Brisac and Scott*, (4 *East*, 171,) Grose, J., said, "conspiracy is a matter of inference, deduced from certain criminal acts of the parties accused, done in pursuance of an apparent criminal purpose in common between them, and which hardly ever are confined to one place." Evidence must then be given of such acts of the defendants respectively, from which the jury may fairly and reasonably imply that they all have been acting in concert, with one common design, and that they intended to effect that which is stated in the indictment to be the object of the conspiracy. If the prosecutor fail in proving this, as against any of the defendants, that defendant must be acquitted. *R. v. Pollman et al.*, 2 *Camp.* 231, 229. But where an indictment charged a conspiracy falsely to indict a man, with intent to extort money from him, and the jury found that the defendants conspired to indict him with that intent, but not falsely: the court held that the word "falsely" might be rejected as surplusage, as it was equally an offence to conspire to indict a man with intent to extort money from him, whether the charge were true or false; and in criminal cases it is suf-

sufficient for the prosecutor to prove so much of the charge as constitutes an offence punishable by law. *R. v. Hollingberry*, 4 B. & C. 829.

General evidence of the conspiracy charged, may be received in the first instance, although it cannot affect a defendant until afterwards brought home to him, or to an agent employed by him. *The Queen's case*, 2 Brod. & B. 302. *R. v. Hammond & Webb*, 2 Esp. 719.

8. The overt acts, or so many of them as may be necessary to prove the conspiracy against all the defendants. This subject has been above already alluded to. Every overt act, to be evidence, must have at least a tendency to prove, either the general nature of the conspiracy, or that one or more of the defendants were operating towards effecting that which is charged in the indictment as being the object of the conspiracy. Where the defendants were charged with a conspiracy to cause themselves to be esteemed persons of property and opulent, for the purpose of defrauding C. D. and other tradesmen; and after evidence was given of their having hired a house in a fashionable street, and representing themselves to one tradesman, whom they had employed to furnish it, as persons of large fortune, it was proposed to prove that they had made similar representations to another tradesman; which was objected to: but Ld. Ellenborough, C. J., held, that there was no ground for the objection; he said that this being an indictment for a conspiracy to carry on the business of common cheats, cumulative instances were necessary to prove the offence. *R. v. Roberts et al.*, 1 Camp. 899. In *R. v. Hunt and others*, (4 B. & Ald. 566) which was a prosecution for a conspiracy to cause great numbers of people to meet at a certain place in Manchester, for the purpose of disturbing the public peace, and of exciting the King's subjects to discontent, hatred of the government, &c., the prosecutor gave in evidence certain resolutions passed at a meeting previously holden in Smithfield, London, for the same avowed purpose as the meeting at Manchester, namely, parliamentary reform, at which Hunt presided as chairman; and this being objected to, on a motion for a new trial, on the ground that there was no evidence to show that it was intended to propose the same resolutions at the Manchester meeting, the court held that, as against Hunt, who, though a stranger, was invited to act, and acted as chairman also at the Manchester meeting, the evidence was properly received, as showing his sentiments and views with respect to parliamentary reform, and to the assembling of multitudes of persons to hear speeches and resolutions under that pretext. It was also proved at the same trial, that large bodies of persons who attended the meeting at Manchester, came from a distance, organised; and with a

regularity of step and movement resembling that of a military march, and that one of these bodies came from a place called "White Moss," and evidence was given that a number of persons were previously seen at White Moss before day-break, practising the marching step, and that seeing the witnesses they ill-treated them, calling them spies, and extorted from one of them an oath never to be a king's man, or to name the name of a king; and it was also proved that some of the parties, in coming into Manchester on the day of the meeting in military order as above mentioned, on passing the house of a witness who had been so ill-treated, expressed their disapprobation of him by hissing: this evidence as to what occurred at White Moss being objected to, the court held that what took place there, coupled with the conduct of those marching to the meeting, in hissing when they passed the witness's house, was unquestionably competent evidence as to the general character and intention of the meeting, and was therefore properly received. *Id.* Upon a trial of some journey-men hatters for a conspiracy to cause another journeyman to be dismissed from his employment for not paying a fine of a guinea which they had imposed upon him, it was proved that the defendants and other journeymen hatters, met at his master's manufactory, in a garret, and the prosecutor being sent for, and appearing before them, they told him he must pay a guinea; it was then proposed to ask him whether he heard any person at the meeting say anything about the appointment of delegates: this was objected to, on the ground that the declaration of others could not be evidence against the defendants, who could be affected only by their own declarations; to which it was answered, that in conspiracy, wherever you lay a sufficient foundation by evidence of several having met for the purpose of the conspiracy, the declarations of any of the parties, made at any time or place, relating to the object of the conspiracy, was evidence as against all: of this opinion was Hotham, B., who tried the case, and the defendants were convicted. *R. v. Salter et al.*, 5 *Esp.* 125. Perhaps the safer rule to lay down upon the subject, would be, that wherever the writings or words of any of the parties charged with or implicated in a conspiracy, can be considered in the nature of an act done in furtherance of the common design, it is admissible in evidence, not only as against the party himself, but as proof of an act, from which (*inter alia*) the jury may infer the conspiracy itself; wherever the writings or words of such a party amount to an admission merely of his own guilt, and cannot be deemed an act done in furtherance of the common design, in that case they can be received in evidence merely as against the party, and not as evidence of the conspiracy, and in strictness ought not to be offered in evidence until after the conspiracy had been proved *aliunde*; but

wherever the writings or words of such party, not being in the nature of an act done in furtherance of the common design, merely tend to implicate others, and not to accuse himself, they ought not to be received in evidence for any purpose. Where in proof of the conspiracy, it was proposed to give in evidence the answer of the defendants to a bill in equity filed against them by the prosecutor, this was objected to by their counsel, on the ground that it was a declaration upon oath, not voluntary, but obtained from them by the compulsory process of the court: Lord Denman, C. J., held the objection to be wholly groundless; it was every day's practice to give the answer of a defendant in evidence on an indictment for perjury. *R. v. Goldshed and Sidney*, 1 Car. & K. 667.

If a written instrument form any part of the offence, no objection can be made to its being given in evidence, on the ground of its not being stamped. *R. v. Poole and Elliott*, 4 Car. & P. 592.

Witnesses.] A wife cannot be a witness for any other parties indicted with her husband for a conspiracy, even though called, not for the purpose of disproving the conspiracy, but to prove that the others took no part in the transaction in question; for her husband may probably be benefitted by it. *R. v. Lockyer et al.*, 5 Esp. 107. And see *R. v. Frederick and Tracy*, 2 Str. 1095. Nor can a defendant, who has pleaded guilty, be called as a witness for those who are tried. See *R. v. Lafone et al.*, 5 Esp. 155. On the other hand, where three were indicted for conspiracy, and defended separately; and after two of them had addressed the jury, and closed their cases, the third addressed the jury, throwing the whole guilt upon the other two defendants, and then called a witness whom he examined as to a conversation between himself and one of the other defendants; the counsel for the prosecution then began to cross-examine the witness as to other conversations which had also taken place between the third defendant and the other, which was objected to on the part of the other defendant, on the ground that such a cross-examination might establish quite a new case against him: but Abbott, C. J., said that as the third defendant had called the witness, and examined him as to one conversation, the counsel for the prosecution could not be prevented from cross-examining him as to other conversations between the same parties; but it might be a matter for future consideration, whether the other defendant, after such evidence, might not have a right to address the jury upon it. *R. v. Kroehl et al.*, 2 Stark. 343.

Verdict, &c.] After the whole of the evidence is given, the jury have to decide upon three questions, namely,

First, whether from the whole of the evidence (if there be no express proof of the conspiracy) they can fairly infer that there was a conspiracy;—Second, whether that conspiracy was to effect the particular object stated in the indictment;—and Third, whether all the defendants, or which of them, were concerned in it. If they acquit all but one, they must acquit that one also, however criminal they may think him, unless the indictment charge him with having conspired with other persons who are not tried; for one person alone cannot be guilty of a conspiracy. 1 *Hawk. c. 72, s. 8.* And for the same reason, a husband and wife alone cannot be indicted for a conspiracy, for they are but one person in law. *Id.* But where two conspire, and one dies, the other may be indicted and tried for the conspiracy. *R. v. E. Nicholls, 2 Str. 1927.*

Where four were indicted for a conspiracy, and two pleaded not guilty, a third pleaded in abatement, to which plea there was a demurrer, and the fourth did not appear; the record as to the two who pleaded not guilty, was taken down for trial, and one was acquitted, and the other found guilty of having conspired with the party who had pleaded in abatement; the demurrer was then argued, and judgment of *respondens ouster* given, and that defendant then pleaded not guilty; upon the defendant, who was found guilty, being brought up for judgment, he objected that no judgment ought to be passed upon him, until after the trial of him who had before pleaded in abatement, for if the latter should be acquitted, it would be a virtual acquittal of him, and the judgment would be erroneous: but the court said that they would not be justified in deferring a judgment, fully warranted by the verdict already given, merely from the possibility of the acquittal of the other party. *R. v. Cooke, 5 B. & C. 538.*

CHAPTER V.

Subsequent Felony.

Indictment.

— } The jurors for our Lady the Queen, upon their
to wit. } oath present, that heretofore, to wit, at the general
quarter sessions of the peace, holden at —, in and for the
county of —, on the — day of —, in the year of our Lord
—, A. B. [by the name of E. F.] was convicted of felony,
which conviction is still in full force, strength, and effect, and
not in the least reversed, annulled, or made void: and the jurors

aforesaid upon their oath aforesaid do further present, that the said A. B. being so convicted as aforesaid, afterwards, to wit, on the — day of —, in the year —, [describing the subsequent felony, as in ordinary cases.] It is not necessary to set out the judgment upon the former conviction; it is merely necessary to state that the defendant was convicted of felony. *R. v. Spencer et al.*, 1 Car. & K. 168. Also, it is not necessary to conclude contra formam statuti, if the subsequent felony be merely a common law offence. *R. v. Blea*, 8 Car. & P. 785.

Felony; transportation for life, or not less than seven years;—or imprisonment [with or without hard labour, and solitary for any portion of the time, s. 9], for not more than four years, and if a male, to be once, twice or thrice publicly or privately whipped, if the court shall think fit. 7 & 8 G. 4; c. 28, s. 11.

Arraignment.

The prisoner is to be arraigned upon the whole indictment, including the former conviction; and if he plead not guilty, then the jury in the first instance are charged with the subsequent offence, and only that part of the indictment read to them which relates to it; and if they find him guilty, then (without their being again sworn) that part of the indictment relating to the previous conviction is read to them, and they are charged with it; and if they find that he was previously convicted, then a verdict of guilty on the whole indictment is entered. This has been determined to be the proper course, by the whole body of the judges, upon full consideration. *Per Lord Campbell, C. J.*, in *R. v. Shuttleworth*, 51 Law J. 36 m. The following are the statutes upon the subject:—

By stat. 6 & 7 W. 4, c. 111, (after reciting the stat. 7 & 8 G. 4, c. 28, s. 11, on which the above indictment is framed) it is enacted "that it shall not be lawful, on the trial of any person for any such subsequent felony, to charge the jury to inquire concerning such previous conviction, until they shall have inquired concerning such subsequent felony, and shall have found such person guilty of the same; and whenever in any indictment such previous conviction shall be stated, the reading of such statement to the jury as part of the indictment shall be deferred until after such finding as aforesaid: provided nevertheless, that if upon the trial of any person for any such subsequent felony as aforesaid, such person shall give evidence of his or her good character, it shall be lawful for the prosecutor, in answer thereto, to give evidence of the indictment and conviction of such person for the previous felony

before such verdict of guilty shall have been returned, and the jury shall inquire concerning such previous conviction for felony at the same time that they inquire concerning the subsequent felony."

By stat. 14 & 15 Vict. c. 19, (which punishes certain offences as misdemeanors, as mentioned *ante*, p. 358, and makes such offences a felony, if committed after a conviction for the like offence or for a felony) after reciting the statute 12 & 13 Vict. c. 11 (*see post*, p. 626), and that it was expedient to define the time of charging the jury to inquire as to such previous conviction: it is enacted, "That it shall not be lawful on the trial of any person for any subsequent offence, where a plea of not guilty shall have been entered on his behalf, to charge the jury to inquire concerning any previous conviction until they shall have inquired concerning such subsequent offence, and shall have found such person guilty of the same; and whenever in any indictment any previous conviction shall be stated, the reading of such statement shall be deferred until after such finding as aforesaid: provided, that if upon the trial of any person for any such subsequent offence as aforesaid, such person shall give evidence of his good character, it shall be lawful for the prosecutor, in answer thereto, to give evidence of the conviction of such person for the previous offence or offences, before such verdict of guilty shall have been returned, and the jury shall inquire concerning such previous conviction or convictions at the same time that they inquire concerning such subsequent offence." The words here, "the reading of such statement," mean the reading of it to the jury in charging them in the first instance. Where the prisoner was indicted for a larceny after a former conviction for felony, and was arraigned upon the whole indictment, and pleaded,—it was objected that the plea was a nullity as being contrary to the provisions of the above statute, and that any judgment upon a conviction for the offence would be void; the prisoner being, however, convicted and sentenced, and the point reserved for the criminal appeal court, the judges of that court held the mode of arraignment to be correct. *R. v. Shuttleworth*, 21 *Law J.* 36 *m.* So, where it was insisted that the jury, after finding a defendant guilty of the subsequent felony, should be again sworn to inquire of the previous conviction, upon a statement that such was the practice directed and observed by Mr. Baron Parke, and the jury were re-sworn accordingly; but upon the first juror being about to be sworn, the counsel for the prisoner insisted on his right to challenge the jury, which however was not allowed, and the prisoner was found guilty: the point being reserved for the opinion of the criminal appeal court, the judges held that the prisoner was not entitled at that stage of the case to challenge the jury; and Lord Campbell said that on two circuits

which he went with Mr. Baron Parke, the learned baron followed a totally different course from that stated. *R. v. Key*, 21 *Law J.* 35 m.

Evidence.

To maintain this indictment, the prosecutor must prove—

1. The subsequent felony, stated, as in ordinary cases.

2. The former conviction. This is proved, by producing a certificate of it signed by the clerk of the court or other officer having the custody of the records of the court where the prisoner was first convicted, or by his deputy, as directed by stat. 7 & 8 G. 4, c. 28, s. 11, and 14 & 15 Vict. c. 19, s. 2, and which is evidence without proof of signature, &c. Where such a certificate stated merely the offence and conviction, but not the judgment, *Cresswell, J.*, held it to be insufficient. *R. v. Actroyd and Jagger*, 1 *Car. & K.* 158. You must then prove the identity of the prisoner, as the person before convicted; which may be proved by the gaoler or any other person who was present at his trial, or who otherwise knows the fact of his own knowledge. This evidence however is not given, until after the jury have found the prisoner guilty of the subsequent felony,—unless the prisoner have given evidence of good character (either by calling witnesses to prove it, or by cross-examining a witness for the prosecution as to it, *R. v. Shrimpton*, 21 *Law J.* 37 m. *R. v. Gadbury*, 8 *Car. & P.* 676), in which case the prosecutor may prove the former conviction and identity as part of his case, before the verdict of guilty as to the subsequent felony is returned, and then the jury shall inquire of, and find their verdict upon, the whole case. See stat. 6 & 7 W. 4, c. 111, and 14 & 15 Vict. c. 19, s. 9, *ante*, p. 624, 625.

Larceny after two Summary Convictions.

By stat. 12 Vict. c. 11, (which took away the punishment of transportation for simple larceny,) it is enacted by sect. 3, that where any person has been twice convicted of any of the offences punishable upon summary conviction under the provisions contained in an Act passed in the eighth year of the reign of King George the Fourth, intituled “An Act for consolidating and amending the laws of England relative to larceny and other offences connected therewith” (7 & 8 G. 4, c. 29, *as to larceny*, &c.)—or by an Act passed in the same year, intituled “An Act for consolidating and amending the laws of England relative to malicious injuries to property,”

Larceny after Summary

(2 & 3 G. 4, c. 20, *as to conditions in part* passed in the eleventh year of Her Majesty, Act for the more speedy trial and punishment of offenders" (10 & 11 Vict. c. 82, *ante*, p. 59.)—if of the convictions has been in respect of an offence & description or not, and whether such convictions or them, be before or after the passing of this Act:—if the person so twice convicted shall afterwards commit the offence of simple larceny, or any offence made punishable by stat. 7 & 8 G. 4, c. 20, like simple larceny, such offender, being convicted thereof, shall be liable to be punished as if this Act had not been passed:—that is to say, by transportation for seven years; or imprisonment [with or without hard labour, s. 4,] for not more than two years; and if a male, to be once, twice, or thrice publicly or privately whipped, if the court shall think fit. 7 & 8 G. 4, c. 20, s. 3.

And by sect. 4, in the indictment "it shall be sufficient to state that such person was at certain times and places so twice convicted as aforesaid, without otherwise describing the offences of which each person was so convicted as aforesaid; and a copy of any such conviction, certified by the proper officer of the court of general or quarter sessions to which such conviction shall have been so transmitted or returned, or proved to be a true copy, shall be sufficient evidence to prove such conviction, and such conviction shall be presumed to be unappealed against, unless the contrary be shown."

Indictment.

— The jurors for our Lady the Queen, upon their oath to wit. Sheweth present, that A. B., on the — day of —, in the year of our Lord —, at —, in the county of —, was duly convicted of an offence punishable upon summary conviction under the provisions contained in a certain Act of parliament made and passed in the [eighth year of the reign of King George the Fourth, intituled An Act for consolidating and amending the laws of England relative to larceny and other offences connected therewith;] and being so convicted, he the said A. B. afterwards on —, at —, was duly convicted of an offence punishable upon summary conviction under the provisions contained in a certain [other] Act of parliament made and passed in the [eleventh year of the reign of her present Majesty, intituled An Act for the more speedy trial and punishment of juvenile offenders, or as the case may be]; and that being so twice convicted as aforesaid, he the said A. B. afterwards, to wit, on the — day of —, in the year of our Lord —, feloniously did steal, take, and carry away [certain money of C. D., and one gold watch, two cloth coats,

and five linen shirts, of the goods and chattels of the said C. D.,] against the peace of our Lady the Queen, her crown and dignity.

See as to punishment, *supra*. The arraignment, &c., must be as in the last case. See *ante*, p. 625.

Evidence.

To maintain this indictment, the prosecutor must prove—

1. The larceny, as *ante*, pp. 369, 371.
2. The former convictions, by producing certified copies, or producing and proving examined copies, as above mentioned, and proof of identity as in the last case.

CHAPTER VI.

Attempts to commit Offences.

Attempt to commit felony or misdemeanor.] By stat. 14 & 15 Vict. c. 100, s. 9, reciting that offenders often escape conviction by reason that such persons ought to have been charged with attempting to commit offences, and not with the actual commission thereof: for remedy thereof it is enacted, "that if on the trial of any person charged with any felony or misdemeanor, it shall appear to the jury upon the evidence that the defendant did not complete the offence charged, but that he was guilty only of an attempt to commit the same, such person shall not by reason thereof be entitled to be acquitted, but the jury shall be at liberty to return as their verdict that the defendant is not guilty of the felony or misdemeanor charged, but is guilty of an attempt to commit the same; and thereupon such person shall be liable to be punished in the same manner as if he had been convicted upon an indictment for attempting to commit the particular felony or misdemeanor charged in the said indictment; and no person so tried as herein lastly mentioned shall be liable to be afterwards prosecuted for an attempt to commit the felony or misdemeanor for which he was so tried.

If however the party be indicted for the attempt, the indictment may readily be framed, by stating that "A. B. unlawfully did attempt and endeavour to [*stating the offence*], by [*stating what he did*]; or where the offence consists of several parts, and was complete, excepting a certain part of it,

The indictment may be framed as the form, *ante*, p. 472, for attempting to obtain money by false pretences.

An attempt to commit a felony, when not otherwise punishable by statute, is punishable with fine,--or imprisonment [with or without hard labour, 3 G. 4, c. 114],--or both. Costs, see ante, p. 187.

An attempt to commit a misdemeanor, when not otherwise punishable by statute, is punishable with fine, or imprisonment, or both.

See as to an attempt to administer poison, *ante*, p. 258;--to murder, *ante*, pp. 259, 269, 270, 272;--to drown, 276;--to suffocate, 277;--to strangle, 277;--to commit a rape, 306;--to commit an unnatural offence, 310.

Attempt to set fire to buildings, ships, mines, stacks, &c.] By stat. 8 & 9 Vict. c. 25, s. 7, "whoever shall unlawfully and maliciously by any overt act, attempt to set fire to any building, vessel, or mine, or to any stack or steer, or to any vegetable produce, of such kind and with such intent, that if the offence were complete, the offender would be guilty of felony, and liable to be transported beyond the seas for the term of his natural life,--shall, although such building, vessel, mine, stack, steer, or vegetable produce be not actually set on fire, be guilty of felony, and being convicted thereof, shall be liable, at the discretion of the court, to be transported beyond the seas for any term not exceeding fifteen years, or be imprisoned [with or without hard labour, and solitary for not more than one month at a time, or three months in a year, s. 11] for not more than two years; and if a male under eighteen, he may be publicly or privately whipped not exceeding thrice. *Id.* s. 9.

Assault with intent to rob.] By stat. 14 & 15 Vict. c. 100, s. 11, "if upon the trial of any person, upon any indictment for robbery, it shall appear to the jury upon the evidence, that the defendant did not commit the crime of robbery, but that he did commit an assault with intent to rob, the defendant shall not by reason thereof be entitled to be acquitted, but the jury shall be at liberty to return as their verdict that the defendant is guilty of an assault with intent to rob; and thereupon such defendant shall be liable to be punished in the same manner as if he had been convicted upon an indictment for feloniously assaulting with intent to rob; and no person so tried as is herein lastly mentioned shall be liable to be afterwards prosecuted for an assault with intent to commit the robbery for which he was so tried."

Or the defendant may be indicted for the assault. See the form of the indictment, the evidence, and the punishment, *ante*, pp. 425, 426.

Assault with intent to commit other felony.] An assault with intent to commit a felony, where it is not otherwise specially punishable by statute, is, by stat. 9 G. 4, c. 31, s. 25, punishable with imprisonment, with or without hard labour, for not more than two years, and the court may also, if it think fit, fine the offender, and require him to find sureties for keeping the peace. As to the form of an indictment for such an assault, see *ante*, p. 285, from which an indictment in any case may be readily framed.

Formerly, by stat. 1 Vict. c. 85, s. 11, on the trial of any person for any of the offences therein mentioned (see *ante*, pp. 259, 262, 269, 270, 272—280), or for any other felony which should include an assault against the person, the jury might acquit of the felony, and find a verdict of guilty as to the assault. But this is now repealed by stat. 14 & 15 Vict. c. 100, s. 10, and the more general provision already mentioned, *ante*, p. 628, introduced, allowing the jury, upon all indictments for felony or misdemeanor, to acquit of the offence, and find the party guilty of an attempt to commit it.

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